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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 179

SOUTH BUFFALO RAILWAY COMPANY,
APPELLANT,

vs.

GERTRUDE SLOAN AHERN AND NEW YORK STATE WORKMEN'S COMPENSATION BOARD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED JULY 5, 1952

PROBABLE JURISDICTION NOTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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SOUTH BUFFALO RAILWAY COMPANY,
APPELLANT,

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GERTRUDE SLOAN AHERN AND NEW YORK STATE WORKMEN'S COMPENSATION BOARD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1a]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Claim for Compensation under the Workmen's Compensation Law made by THOMAS J. AHERN and by GERTRUDE SLOAN AHERN, widow, Claimant-Respondent,

against

SOUTH BUFFALO RAILWAY COMPANY, Employer and Self Insurer, Appellant,

WORKMEN'S COMPENSATION BOARD, Respondent

STATEMENT UNDER RULE 234

This is an appeal by South Buffalo Railway Company, employer and self insurer, from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of its Clerk on November 27, 1950, which unanimously affirmed a decision and award of the Workmen's Compensation Board filed in the office of said Board on May 2, 1949, and from an order of said Board entered thereon.

An application by the employer and self insurer duly made to said Appellate Division for reargument or, in the alternative, for permission to appeal to the Court of Ap-
[fol. 2a] peals was denied on March 7, 1951. Thereafter, an application was duly made by the employer and self insurer to the Court of Appeals for permission to appeal to that Court and was denied on June 1, 1951, upon the ground that an appeal lay as of right.

There has not been any change of parties or attorneys since the appeal to said Appellate Division except that Messrs. Cravath, Swaine & Moore, 15 Broad Street, New York 5, New York, have been substituted in the place and stead of Messrs. Kenefick, Bass, Letchworth, Baldy & Phillips (formerly Kenefick, Cooke, Mitchell, Bass & Letchworth), Marine Trust Building, 239 Main Street, Buffalo, New York, as attorneys for South Buffalo Railway Company, the employer and self insurer.

[fol. 3a] In Supreme Court of the State of New York, Appellate Division—Third Judicial Department

In the Matter of the Claim for Compensation under the Workmen's Compensation Law made by Thomas J. Ahern and by Gertrude Sloan Ahern, widow, Claimant-Respondent,

against

South Buffalo Railway Company, Employer and Self Insurer, Appellant,

Workmen's Compensation Board, Respondent

Statement Under Rule 234

This is an appeal from a decision and award of the Workmen's Compensation Board filed in the office of said Board on May 2, 1949.

The full names of the parties herein are stated in the above title and no change in parties has taken place.

Claimant has been represented before the Workmen's Compensation Board and is represented upon this appeal by Matthew Weimar, Esq., 1044 Ellicott Square Building, Buffalo, New York. The self-insured employer, South Buffalo Railway Company, was represented before the [fol. 4a] Workmen's Compensation Board and is represented upon this appeal by the law firm of Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, 239 Main Street, Buffalo, New York. The Workmen's Compensation Board is represented upon this appeal by Nathaniel L. Goldstein, Attorney General for the State of New York, 80 Centre Street, New York 13, New York.

There have been no changes in parties or attorneys since the commencement of this proceeding except that Thomas J. Ahern, claimant, died on January 3, 1949 and his widow, Gertrude Sloan Ahern, residing at 3478 Clinton Street, Gardenville, New York, has been substituted as claimant in his place.

[fol. 1] IN SUPREME COURT OF NEW YORK

WORKMEN'S COMPENSATION BOARD

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that South Buffalo Railway Company, employer and self-insurer, appellant herein, hereby appeals to the Supreme Court, Appellate Division, Third Department, from a decision and award of the Workmen's Compensation Board filed in the office of said Board on May 2, 1949, wherein and whereby said Workmen's Compensation [fol. 2] Board denied application for review or rehearing of a Referee's decision and award, notice of which is dated January 26, 1949, wherein and whereby said Referee awarded claimant compensation in the total amount of $1,795.33 for 99⅝ weeks' disability at $28 per week, and directed that the case be continued for the preparation of a death claim; and

Please take further notice that this appeal is taken both upon the law and upon the facts and from each and every part of said decisions and award.

Dated: Buffalo, New York, May 14, 1949.

Yours, etc., Kenefick, Cooke, Mitchell, Bass & Letchworth, Attorneys for Appellant, Office and Post Office Address, Marine Trust Building, 239 Main Street, Buffalo 3, New York.

To Workmen's Compensation Board, Respondent, 80 Centre Street, New York 13, New York; Workmen's Compensation Board, Respondent, State Office Building, Buffalo [fol. 3] 2, N. Y.; Thomas J. Ahern, Claimant, 3478 Clinton Street, Gardenville, New York; Matthew Weimar, Esq., Attorney for Claimant, 1044 Ellicott Square Bldg., Buffalo, N. Y., and Clerk of the Supreme Court, Appellate Division, Third Department, Albany, New York.

BEFORE WORKMEN'S COMPENSATION BOARD

[Title omitted]

FINDINGS—December 21, 1949.

This claim came on to be heard before the Workmen's Compensation Board of the State of New York on March [fol. 4] 6, 1945, March 27, 1945, May 1, 1945, May 22, 1945, July 3, 1945, January 8, 1946, February 4, 1947 and January 18, 1949.

Appearances:

Kenefick, Cooke, Mitchell, Bass & Letchworth, Esqs., Attorneys for Appellant, Marine Trust Building, 239 Main Street, Buffalo 3, New York.

Matthew Weimar, Esq., Attorney for Widow, 1044 Ellicott Square Bldg., Buffalo, New York.

Gertrude Sloan Ahern, 3478 Clinton Street, Gardenville, New York.

All the evidence having been heard and duly considered, the Workmen's Compensation Board makes its Findings of Fact, Rulings of Law, Award and Decision as follows:

FINDINGS OF FACT

1. On the 1st day of July, 1944, Thomas J. Ahern resided at 3478 Clinton Street, Gardenville, N. Y., and was employed as a switchman by South Buffalo Railway Company, with office and principal place of business located at Hamburg Turnpike, Lackawanna, New York. The employer was engaged in the transportation business.

2. On the said 1st day of July, 1944, while the said Thomas J. Ahern was engaged in the regular course of his employment and while working for his employer and while throwing a switch, the switch stuck and the said Thomas J. Ahern was compelled to and did use extra exertion, strain and effort, and by reason thereof, he became faint and [fol. 5] nauseated and suffered an acute coronary occlusion.

Due to said accidental injury sustained by Thomas J. Ahern on July 1, 1944, he was caused to be totally disabled from July 1, 1944 to January 3, 1949 when he died.

3. The injury sustained by the said Thomas J. Ahern was an accidental injury and arose out of and in the course of his employment.

4. An award of compensation was made to the said Thomas J. Ahern on September 11, 1945, for 48 2/6 weeks from July 1, 1944 to June 5, 1945, at the rate of $28 per week, amounting to the sum of $1,353.33, which award was paid by the self-insured employer on December 4, 1945.

On January 10, 1946 and February 4, 1947, further awards were made in favor of Thomas J. Ahern, for 87 weeks' compensation from June 5, 1945 to February 4, 1947 at the rate of $28 per week, amounting to the sum of $2436.

The said employer has paid compensation to the said Thomas J. Ahern covering the period from June 5, 1945 to about December 20, 1948.

5. On January 18, 1949, at a hearing before the referee, the employer stated that it was controverting this claim on the ground of lack of jurisdiction.

Thereafter, and on or about February 21, 1949, the employer filed an application to review the award of the referee hereinafter set forth on the grounds that the em-[fol. 6] ployee was engaged in interstate commerce, that this case comes within the terms of the Federal Employer's Liability Act and that the Workmen's Compensation Board had no jurisdiction herein.

6. The said self-insured employer, by its conduct and the effect thereof on the rights of the deceased claimant or those entitled to take benefits due or that may become due as a result of the accident of July 1, 1944, waived its right to question the jurisdiction of the Workmen's Compensation Board, has been guilty of laches and is now estopped from pleading the defense of the Federal Employer's Liability Act.

7. The average weekly wage of the said Thomas J. Ahern was a sum such as to entitle him to a compensation rate of $28 per week for total disability.

8. The said Thomas J. Ahern left him surviving Gertrude Sloan Ahern, widow.

RULINGS OF LAW

This claim comes within the provisions of the Workmen's Compensation Law and within the jurisdiction of the State of New York.

AWARD

Award of compensation is hereby made against South Buffalo Railway Company, self-insured employer, to Thomas J. Ahern, employee, for 97⅝ weeks' compensation from February 4, 1947 to December 20, 1948 at the rate of $28 per week, amounting to the sum of $1,739.33.

[fol. 7] Further award is made against said self-insured employer payable to the widow for 2 weeks' compensation from December 20, 1948 to January 3, 1949 at the rate of $28 per week amounting to the sum of $56.00 and this case is continued for the preparation of a death claim.

DECISION

The employer's applications to rescind the decision and award of January 18, 1949 and to dismiss the claim for lack of jurisdiction is hereby denied.

Dated: New York, N. Y., December 21, 1949.

Workmen's Compensation Board, James Amadei, R. J. Carmichael, Abraham Greenbush.

[fol. 8] RB-61

BEFORE WORKMEN'S COMPENSATION BOARD, STATE OF NEW YORK

80 Centre Street, New York 13, N. Y.

NOTICE OF DECISION—May 2, 1949

Mary Donlon, Chairman.

May 2, 1949.

Case No. 84414831

THOMAS J. AHERN

vs.

SOUTH BUFFALO RAILWAY CO.

South Buffalo Railway Co., 2558 Hamburg Turnpike, Lackawanna, N. Y.

GENTLEMEN:

Please take notice that the Workmen's Compensation Board has this day denied application for a review or rehearing of the above captioned case on the grounds stated in its memorandum of decision of which copy is attached.

Very truly yours, Haskell Schwartz, Secretary.

Att./mlf.

cc:

Mrs. Gertrude S. Ahern, 3478 Clinton Street, Gardenville, N. Y.; Matthew Weimar, Esq., 1044 Ellicott Sq. Bldg., Buffalo, N. Y.

[fol. 9] MEMORANDUM OF DECISION

Case No. 84414831 (Self-Ins. #600)

THOMAS J. AHERN

v.

SOUTH BUFFALO RAILWAY CO.

On January 26, 1949 an award was made in the above captioned disability case from February 4, 1947 to January 3, 1949 at $28 and the case was continued for preparation of a death claim.

The self-insured employer objects to the award and asks for review, contending that the Board is without jurisdiction since the deceased claimant was employed in interstate commerce and "that this case comes within the terms of the Federal Employer's Liability Act if any cause of action exists at all * * *"

On July 1, 1944 claimant suffered an acute coronary occlusion while employed at the South Buffalo Railway Yards. The employer, in a C-7 notice of controversy filed on February 9, 1945, raised issues of accident and causal relationship. After many hearings and on September 24, 1945, findings of accident and causal relationship were made and claimant awarded compensation for total disability from July 1, 1944 to June 5, 1945. On November 8, 1945 the Board affirmed the findings of the Referee and denied the employer's application for review. The employer thereupon paid the award of September 24, 1945 and has continued to pay compensation up until the time of claimant's death.

The question of jurisdiction is raised now for the first time. The self-insured employer relies on the case of [fol. 10] Fitzgerald v. Harbor Lighterage Company, 244 N. Y. 132 in support of its application for review or rehearing.

The Fitzgerald case is authority for the proposition that the filing of a claim, the making of an award and acceptance of compensation does not preclude a claimant from subsequently proceeding under the Maritime Law. In a subsequent decision, Kane v. Morse Dry Dock and Repair Co.,

277 N. Y. Rep., the Court of Appeals has affirmed a lower court's decision, which cites the Fitzgerald case, to the effect that an employer by its conduct may waive and be estopped from raising the question of jurisdiction.

In the opinion of the Board, the self-insured employer herein has been guilty of laches and has, by its conduct and the effect thereof on the rights of deceased claimant or those entitled to take benefits due or that may become due as a result of the accident of July 1, 1944, waived its right to question the jurisdiction of the Workmen's Compensation Law.

The self-insured employer's application for review or rehearing is therefore denied.

Dated: April 21, 1949.

EM-19

Copies to:
Mrs. Gertrude Sloan Ahern
3478 Clinton Street
Gardenville, New York

[fol. 11] Matthew Weimar, Esq.,
1044 Ellicott Square Bldg.
Buffalo, New York

South Buffalo Railway Co.
2558 Hamburg Turnpike
Lackawanna, New York

BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE OF DECISION, MARCH 27, 1945

Form C-23

State of New York
Department of Labor
Division of Workmen's Compensation

Case No. 84414831-1
Carrier & No.: Date of Acc.:

Thomas J. A'Hern, Claimant,
3478 Clinton St.
Gardenville, N. Y.

South Buffalo R. R. Co., Employer,
2558 Hamburg Tpke
Lackawanna, N. Y.
Self Ins.

Atty. M. Weinert,
1044 Ellicott Sq., Buffalo, N. Y.

Dr. Fleming,
3502 Clinton St.
Gardenville, N. Y.

Dr. Fleming's fee is approved at $10.00 and Sec. 13-F. Plus Mileage.

You are hereby notified that at a hearing held before the State Industrial Board on 3-27-45 a decision was made as follows:

[fol. 12] Award to the claimant for disability ..... weeks compensation at $..... per week, total $..... covering the period from ..... to ..... and the case was adjourned for testimony of Dr. Fleming under section 13-F. and Mr. Dockstatter by claimant.

The employer and the insurance carrier are directed to pay this amount to the claimant at once, less payments already made to him covering this period.

Take Notice that the above award or decision was duly filed in the office of the Department on the 27th day of Mar., 1945.

Dated: .....

3-27-45 HP.
BO EA

Edward Corsi, Industrial Commissioner.

[fol. 13] BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE OF DECISION, MAY 1, 1945

Form C-23

State of New York

Department of Labor

Workmen's Compensation Board

Case No. 84414831-1
Carrier & No.: ..... Date of Acc.: .....

Thomas J. A'Hern, res. Claimant,
4378 Clinton St.
Gardenville, N. Y.

South Buffalo R. R. Co., Employer,
2558 Hamburg Tpke
Lackawanna, N. Y.
Self.

M. Weimar, Att'y
1044 Ellicott Sq.
Buffalo, N. Y.

Dr. T. E. Flemming
3502 Clinton St.
Gardenville, N. Y.

Dr. Flemming's fee is fixed at $10.00, plus mileage under Sec. 13-F.

You are hereby notified that at a hearing held before the

State Industrial Board on 5-1-45 a decision was made as follows:

Award to the claimant for disability ..... weeks compensation at $ ..... per week, total $ ..... covering the period from ..... to ..... and the case was continued for examination of claimant by heart specialist at request of claimant.

[fol. 14] The employer and the insurance carrier are directed to pay this amount to the claimant at once, less payments already made to him covering this period.

Take Notice that the above award or decision was duly filed in the office of the Department on the 1st day of May, 1945.

Dated: 5-1-45 JC

BO FB

Mary Donlon, Chairman.

[fol. 15] Before Workmen's Compensation Board

Form C-23

Notice of Decision and Award—September 24, 1945

Workmen's Compensation Board
State of New York

Case No. 84414831
Carrier and No. Self

Date of Accident .....

Thomas J. A'Hern, Claimant,
3478 Clinton St., Pres.
Gardenville, N. Y.

South Buffalo Railway Co., Employer,
2558 Hamburg Tpke.,
Lackawanna, N. Y.

M. Weimar, Att'y.,
1044 Ellicott Sq. Bldg.,
Buffalo, N. Y.

Referee Oddo.

You are hereby notified that after hearing on 7-3-45 an Award or Decision was made and duly filed this day as follows:

(See Decision attached.)

Award:

The Employer and the Insurance Carrier are directed to pay to:

Claimant (at once) the sum of $1353.33 for disability over a period of 48-2/6 weeks from 7-1-44 to 6-5-45 at rate of 28.00 per week less payments made covering this period and case was continued for consideration of extent and [fol. 16] length of disability subsequent to June 5, 1945 and all other issues.

Claimant's Attorney ..... as lien on award payable by separate check, the sum of $.....

Doctor ..... pursuant to Sec. 13, W. C. L., sum of $.....

Decision: .....

Dated: 9-24-45 JC

Mary Donlon, Chairman, Workmen's Compensation Board.

Dec: R. Oddo 9-11-45.

DECISION OF SEPTEMBER 11, 1945

84414831

THOMAS J. AHERN

vs.

SOUTH BUFFALO RAILWAY CO.

This claim is controverted on the grounds that claimant did not sustain accidental injuries and that his disability is not causally related to the alleged injuries.

Facts

The claimant alleges that he has been employed as a switchman for over ten years. That he started his last day's work on the night of June 30, 1944 and continued to

work until about 4 A. M. on July 1, 1944 when he "threw a switch" to switch cars to the front of "C" Furnace. He [fol. 17] testified at hearing of 3-27-45 (see Pages 6 to 25 of the minutes) and described the condition of the switch and his activities in "throwing it" on the morning of July 1.

Several fellow employees testified relative to the condition of the switch and the effort required to "throw it". Edward Dockstader, the Yard Master, testified on 5-1-34 (see Pages 10 to 22 of the Minutes).

There is no definite proof as to the number of times claimant was required to "throw the switch" in question during the period of over ten years service and none of the witnesses, other than the claimant, testified relative to the actual condition of the switch on the day of the alleged accident.

The evidence conclusively establishes that the switch was subject to being blocked by slag drops, cinders and dirt and was described as one of the switches which was hard to throw.

It is undisputed that the claimant became sick immediately after he "threw the switch". He affirmatively and positively stated that he exerted unusual effort in throwing it and that he became sick while engaged in the last step in throwing the switch.

Dr. Flemming attended the claimant immediately after the accident. He testified at hearings of 3-27-45 and 5-1-45 and expressed a definite opinion on causal relationship. No other medical witnesses were produced but the record contains prose reports of Dr. Leopold and Dr. Russell. [fol. 18] These reports do not conflict with the opinion expressed by Dr. Flemming and as a matter of fact they support the theory of causal relationship. The parties stipulated that the Referee may consider the contents of the reports with the same force and effect as if they were verified.

Findings and Decision

After a careful review and consideration of all the evidence in this case, I find:

1. That the exertion expended by the claimant when engaged in throwing a switch on July 1, 1944 was the competent cause of coronary occlusion which disabled him,

2. That the throwing of the switch constituted a task which required the exercise of unusual effort and energy in its performance. The testimony developed that the duties of the claimant did not follow an exact pattern. The only evidence relative to the condition of the switch at the time of claimant's injury was that given by the claimant. He affirmatively and definitely stated that he was required to exercise unusual energy and effort in throwing the switch and that he was rendered sick before he completed the task. To arrive at any other conclusion requires engaging in sheer speculation.

3. That the medical proof establishes that the claimant was totally disabled by the injuries he sutained while throwing the switch and that he has remained continuously totally disabled as a result of said injuries up to and in-
[fol. 19] cluding June 5, 1945 when he was examined by Dr. Leopold, and I, therefore, award compensation to the claimant for temporary total disability from July 1, 1944 to June 5, 1945 at a rate to be fixed on wage statement to be produced by the carrier and I direct that the case be scheduled for a hearing to consider extent and length of disability subsequent to June 5, 1945 and all other issues.

Bart A. Oddo, Referee.

9-11-45 JC

BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE OF DECISION—November 15, 1945

Workmen's Compensation Board

State of New York

Department of Labor

80 Centre St., New York, N. Y.

November 15, 1945.

Re: Case No. 84414831 (Self)

THOMAS J. A'HERN

vs.

SOUTH BUFFALO R. R. Co.

South Buffalo R. R. Co.
2558 Hamburg Tpke.
Lackawanna, N. Y.

DEAR SIRS:

Please take notice that the Workmen's Compensation Board has this day denied application for a review or re-[fol. 20] hearing of the above captioned case on the grounds stated in its memorandum of decision of which copy is attached.

Very truly yours, (Signed) Haskell Schwartz, Secretary.

hs/rp
att/ct

Thomas J. A'Hern,
3478 Clinton Street,
Gardenville, N. Y.

MEMORANDUM OF DECISION

Case No. 84414831 (Self)

THOMAS J. A'HERN

vs.

South Buffalo RR Co.

On September 11, 1945 claimant was awarded 48 2/6 weeks compensation from July 1, 1944 to June 5, 1945 at $28 per week, a total of $1353.33 and case continued.

Carrier contends that the evidence does not substantiate a finding of accidental injury arising out of and in the course of employment.

Claimant, a 38 year old switchman, on March 27, 1945 testified that on July 1, 1944 he was hindend man of the crew and when they got to "C" furnace to throw the switch, it stuck and he had to tug and jerk first with the left hand and then with both and finally to jump on the switch with his whole body to pull the lug down. Claimant further [fol. 21] testified that he started to feel weak, dizzy, rubbed his face with his hands, wanted to throw up, could not talk, and was taken by his co-workers to the Dispensary and then by ambulance to Moses Taylor Hospital where a diagnosis of coronary occlusion was made. Claimant testified that this switch threw harder that night than other switches and that he had to throw the switch quickly as the other men and the engine were waiting and that cinders, slag and sand gets under the tracks and made it difficult to throw the switch.

Claimant's testimony is in all respects borne out by the testimony of Martin McDonough, drawbar man, who testified that this particular switch was always hard to throw. Alfred Buil, locomotive engineer, on March 27, 1945 testified that claimant looked well when he started to work but was shaking all over after the accident. John Pawlak, conductor, on March 27, 1945 also testified that claimant's physical condition was normal when he started to work, that this switch requires all your might, pulls hard and required extra work and effort to throw it as slag and dirt gets under the plate and causes the switch to stick.

On May 1, 1945, claimant's yard master, Edward Dockstader, testified that the switch in question is next to the blast furnace and that slag splashes over the switch and makes it hard to operate.

All the medical evidence on file indicates that the unusual exertion on July 1, 1944 precipitated claimant's heart attack. The Board sees no reason to disturb the Referee's [fol. 22] decision filed on Sept. 24, 1945 and carrier's application for review is accordingly denied.

Dated: November 8, 1945.

MC 6

Copies to:

Thomas J. A'Hern,
3478 Clinton Street,
Gardenville, New York.

South Buffalo Railway Co.,
2558 Hamburg Tpke.,
Lackawanna, New York.

Order of the Workmen's Compensation Board denying application for rehearing or review filed Nov. 15, 1945.

(Signed) G. M. Custer, Clerk.

A True Copy of Decision. Filed Nov. 15, 1945.

(Signed) Haskell Schwartz, Secretary.

[fol. 23] BEFORE WORKMEN'S COMPENSATION BOARD

Form C-23.

NOTICE OF DECISION AND AWARD—January 10, 1946

Workmen's Compensation Board
State of New York

Case No. 84414831-1
Carrier and No. Self Ins.
Date of Accident .....

Thomas J. A'Hern, Claimant,
3478 Clinton St.,
Gardenville, N.Y.

So. Buffalo R. R. Co., Employer,
2558 Hamburg Tpke.,
Lackawanna, N. Y.

Atty. M. Weimar,
1044 Ellicott Sq.,
Buffalo, N. Y.

Referee Oddo.

You are hereby notified that after hearing on 1-8-46 an Award or Decision was made and duly filed this day as follows:

Award:

The Employer and the Insurance Carrier are directed to pay to:

Claimant (at once) the sum of $868.00 for disability over a period of 31 weeks from 6-5-45 to 1-8-46 at rate of 28.00 per week less payments made covering this period and case was Continued until C-8 is filed.

Claimant's Attorney ..... as lien on award payable by separate check, the sum of $.....

[fol. 24] Doctor ..... pursuant to Sec. 13, W. C. L., sum of $.....

Decision: .....

Dated: 1-10-46 W

BO MO

(Signed) Mary Donlon, Chairman Workmen's Compensation Board.

BEFORE WORKMEN'S COMPENSATION BOARD

Form C-23.

NOTICE OF DECISION AND AWARD—February 5, 1947

Workmen's Compensation Board
State of New York

Case No. 84414831-1
Carrier and No. Self Ins.

Date of Accident .....

Thomas J. Ahern, Claimant,
3478 Clinton St.,
Gardenville, N. Y. not pres.

So. Bflo. R. R. Co., Employer,
2558 Hamburg Tpke.,
Lackawanna, N. Y.

M. Weimar, atty.,
1044 Ellicott Sq.,
Buffalo, N. Y.

Referee Oddo.

You are hereby notified that after hearing on 2/4/47 an Award or Decision was made and duly filed this day as follows:

[fol. 25] Award:

The Employer and the Insurance Carrier are directed to pay to:

Claimant (at once) the sum of $1568.00 for disability over a period of 56 weeks from 1/8/46 to 2/4/47 at rate of $28.00

per week less payments made covering this period and case was continued until C-8 if filed.

Claimant's Attorney ..... as lien on award payable by separate check, the sum of $.....

Doctor ..... pursuant to Sec. 13, W.C.L., sum of $.....

Decision: .....

Dated: 2/5/47 AWP

BO FB

(Signed) Mary Donlon, Chairman Workmen's Compensation Board.

[fol. 26] BEFORE WORKMEN'S COMPENSATION BOARD

Form C-23

NOTICE OF DECISION AND AWARD—January 26, 1949

Workmen's Compensation Board
State of New York

Case No. 84414831.
Carrier and No.: 600 Self 100.

Date of Accident: 7/1/44.

Thomas J. Ahern, Claimant,
3478 Clinton St., Gardenville, N. Y.
South Bflo. Railway, Employer,
2558 Hamburg Tpke. Lackawanna, N. Y.

M. Weimar, Atty.
1044 Ellicott Sq., Buffalo, N. Y.

Referee .....

You are hereby notified that after hearing on 1-18-49 an Award or Decision was made and duly filed this day as follows:

Award:

The Employer and/or the Insurance Carrier are directed to pay to:

Claimant (at once) the sum of $1795.33 for disability over a period of ... weeks from ..... to ..... at rate

of ..... per week less payments made covering this period and case was continued for preparation of death claim.

Claimant's Attorney ..... as lien on award payable by separate check, the sum of $.....

[fol. 27] Doctor ..... pursuant to Sec. 13, W. C. L., sum of $.....

Decision:

97	5/6	Wks.	2/4/47	to	12/20/48	at $28.00	$1739.33
2	"		12/20/48	"	1/3/49	" 28.00	56.00
							$1795.33

Dated: 1-26-49.

(Signed) Mary Donlon, Chairman Workmen's Compensation Board.

BO RM'MC t

[fol. 28] BEFORE WORKMEN'S COMPENSATION BOARD

C-90

NOTICE OF REQUEST FOR FURTHER CONSIDERATION—October 11, 1945

South Buffalo Railway Company
Post Office Box 37
Lackawanna 18, N. Y.

State Case No. 84414831

Date of Alleged Accident—July 1, 1944.

Claimant: Thomas Ahern

Employer: South Buffalo Railway Co.

Carrier: Self-Insurer

To:

Thomas Ahern,
3478 Clinton St.,
Gardenville, N. Y.

Matthew Weimar, Esq.,
1044 Ellicott Square Bldg.,
Buffalo 3, N. Y.

Division of Workmen's Compensation
State Office Building,
Buffalo 2, N. Y.

You are hereby notified that on October 11, 1945, the undersigned party in interest in the above case made application to the Workmen's Compensation Board for further consideration of your claim for compensation on which a decision was recently rendered by a Referee, notice of which is dated September 24, 1945.

[fol. 29] Payment of compensation will be withheld pending the action of the Workmen's Compensation Board.

South Buffalo Railway Company, By Kenefick, Cooke, Mitchell, Bass & Letchworth, Attorneys.

By

Dated: October 11, 1945.

Note: Within 20 days after action by the Workmen's Compensation Board above referred to under Section 23 of the Compensation Law any party in interest may take an appeal to the Appellate Division of the Supreme Court.

BEFORE WORKMEN'S COMPENSATION BOARD

APPLICATION FOR REVIEW—October 11, 1945

October 11, 1945.

Miss Mary Donlon,
Chairman, Workmen's Compensation Board,
80 Centre Street,
New York, N. Y.

Thomas Ahern v. South Buffalo Railway Company

No. 84414831

Dear Miss Donlon:

Under date of September 24, 1945, the Referee made an award to the claimant from 7/1/44 to 6/5/45 and continued [fol. 30] the case on the ground that on July 1, 1944, the claimant suffered an accidental injury arising out of and in the course of his employment. On behalf of our client, South Buffalo Railway Company, the employer and self-insurer, we respectfully request that the Workmen's Compensation Board review this decision and reverse the award on the ground that the evidence does not substantiate a finding of accidental injury.

Very truly yours, Kenefick, Cooke, Mitchell, Bass & Letchworth, By —— ——.

Xsc

[fol. 31] BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE OF APPLICATION FOR REVIEW—February 15, 1949

February 15, 1949.

To:—

Hon. Mary Donlon, Chairman,
Workmen's Compensation Board,
80 Centre Street,
New York 13, New York.

Mrs. Gertrude Sloan Ahern, Widow
of Thomas J. Ahern, Claimant,
3478 Clinton Street,
Gardenville, New York.

Matthew Weimar, Esq.,
Attorney for Claimant,
1044 Ellicott Square Bldg.,
Buffalo, New York.

Workmen's Compensation Board,
State Office Building,
Buffalo 2, New York.

Re: Thomas J. Ahern v. South
Buffalo Railway Company.
W. C. B. No. 84414831.

Sirs:

Please take notice that on behalf of the South Buffalo Railway Company, self-insured employer named above, we have this day applied to the Workmen's Compensation Board for a review of the Referee's decision and award herein, notice of which is dated January 26, 1949. A copy of said application for review is annexed hereto and hereby made a part hereof.

[fol. 32] Please take further notice that payment of compensation will be withheld pending determination of said application for review.

Yours etc., Kenefick, Cooke, Mitchell, Bass & Letchworth, Attorneys for South Buffalo Railway Company, Office and Post Office Address, 1330 Marine Trust Building, 239 Main Street, Buffalo, New York.

Psk

APPLICATION FOR REVIEW

February 15, 1949.

Hon. Mary Donlon, Chairman,
Workmen's Compensation Board,
80 Centre Street,
New York 13, New York.

Re: Thomas J. Ahern v. South Buffalo Railway Company.
W. C. B. No. 84414831.

Dear Miss Donlon:

On behalf of the South Buffalo Railway Company, self-insured employer named above, we hereby apply to the Workmen's Compensation Board for a review of the Referee's decision and award, notice of which is dated January 26, 1949.

The grounds for this application for review are that said Thomas J. Ahern, claimant herein, was employed in [fol. 33] interstate commerce by the South Buffalo Railway Company; that this case therefore comes within the terms of the Federal Employer's Liability Act if any cause of action exists at all and that the Workmen's Compensation Board, therefore, has no jurisdiction herein. On behalf of the South Buffalo Railway Company we offered to prove these allegations at the hearing at which the award, as to which application for review is herein made, was handed down but the Referee refused to receive proof.

The claimant and the employer herein have not waived the jurisdictional question under the provisions of § 113 of the Workmen's Compensation Law nor has there been any final award. Therefore, under the case of *Matter of Fitzgerald v. Harbor Lighterage Company*, 244 N. Y. 132, the employer is still entitled to raise the jurisdictional question herein. In support of the employer's contention that it should be permitted to submit proof on the question of jurisdiction in this case, we enclose herewith and make a part hereof the affidavit of F. C. Kluge, Assistant General Superintendent of the South Buffalo Railway Company, duly sworn to on February 17, 1949 asserting in substance that claimant was regularly employed by the

South Buffalo Railway Company as a brakeman in interstate commerce.

Wherefore, on the foregoing grounds and on such other, further and different grounds as to the Board may seem just and proper, we respectfully request that the decision [fol. 34] and award herein, notice of which is dated January 26, 1949, be rescinded and the case returned to the Referee's calendar for proof on the jurisdictional question, or, in the alternative, that said decision and award be rescinded and the claim dismissed for lack of jurisdiction.

Very truly yours, Kenefick, Cooke, Mitchell, Bass & Letchworth, By Solon J. Stone.

AFFIDAVIT OF F. C. KLUGE, FEBRUARY 17, 1949

South Buffalo Railway Company

Lackawanna, N. Y.

STATE OF NEW YORK,
County of Erie, ss.:

Affidavit

F. C. KLUGE being duly sworn deposes and says that he is Assistant General Superintendent of the South Buffalo Railway Company. That Thomas J. Ahern of 3478 Clinton Street, Gardenville, New York, was employed by the South Buffalo Railway Company as a railroad brakeman on February 10, 1941 and that from the time he ntered the employ of the South Buffalo Railway Company until the date of the alleged accident which was reported to have occurred to him on or about July 1, 1944, he was continu- [fol. 35] ously employed by the South Buffalo Railway Company in such capacity in extra and regular board service and that on practically every day which he so worked during such period he was employed in the movement of railroad cars in interstate commerce, which cars were received by the South Buffalo Railway Company from outside of the State of New York for delivery to points in the State of New York and railroad cars in interstate com-

merce which originated in the State of New York and were destined for points outside the State of New York.

F. C. KLUGE.

Subscribed and sworn to before me this 17th day of February, 1949. James J. Scott, Notary Public, In and for Erie County, New York. My Commission expires March 30, 1950.

Psk
Enc.

CC to

Mrs. Gertrude Sloan Ahern,
widow of Thomas J. Ahern, Claimant,
3478 Clinton Street,
Gardenville, New York.

Matthew Weimar, Esq.,
Attorney for Claimant,
1044 Ellicott Square Bldg.,
Buffalo, New York.

Workmen's Compensation Board,
State Office Building,
Buffalo 2, New York.

[fol. 36] BEFORE WORKMEN'S COMPENSATION BOARD

C-3

EMPLOYEE'S CLAIM FOR COMPENSATION, JANUARY 15, 1945

(Copy)

WORKMEN'S COMPENSATION BOARD, STATE OF NEW YORK

W. C. B. Case No. .....
Ins. Carrier's No. .....

Answer All Questions Fully

Injured Person:

1. Name: (First Name) Thomas (Middle Name) Joseph (Family Name) Ahern.

2. Address: (Number and street) 3478 Clinton St. (City) Gardenville (Zone) (State) N. Y.
3. Sex: Male. Age: 38 yrs. Married or single: Married.
4. Do you speak English? Yes. If not, what language do you speak? Irish.
5. State regular occupation: Switchman.
6. What were you doing when injured? Throwing a switch.
7. Wages or average earnings per day, including overtime, board, rent and other allowances: $8.54.
8. Were you paid full wages for the day of accident? Yes.
9. Piece or time worker: Time worker.

Employer:

1. Employer: South Buffalo Ry. Co.
2. Office address: (Number and street) Hamburg Turn-
[fol. 37] pike (City) Lackawanna (Zone) (State) N. Y.
3. Nature of business: Railroad.

Place and Time:

1. Location of place where accident occurred: C Furnace.
2. Name of Foreman: E. Dockstader.
3. Date of accident, the 1 day of July, 1944, at 4 o'clock A. M.

The Accident:

1. How did accident happen? While throwing switch became faint and nauseated.

Nature and Extent of Injury:

1. State fully nature of injury: Coronary occulsion.
2. On what date did you stop work because of injury? July 1, 1944.
3. Have you returned to work? (Yes or No) No. If "Yes" on what date: —
4. Does injury keep you from work? (Yes or No) Yes.
5. Have you done any work during period of disability? No.
6. Have you received any wages since your accident? No. If so, from and to what date?
7. Has injury resulted in amputation? No. If so, describe same:

8. Did you secure medical attention? Yes.
9. Attending physician: (Name) Dr. T. Fleming (Address) 3502 Clinton St., Gardenville, N. Y.
10. Hospital: (Name) (Address)

[fol. 38]. Notice:

1. Have you given your employer notice of injury? (Yes or No) Yes. When? July 1, 1944.
2. If such notice was given, to whom? E. Dockstader—yardmaster.
3. Was it given orally or in writing? Orally.

I hereby present my claim to the Chairman, Workmen's Compensation Board, for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in support of it I make the foregoing statement of facts.

Dated: January 15, 1945.

Signed by: Thomas J. Ahern, (Claimant); Mail address: 3478 Clinton St., (Number and Street) Gardenville, N. Y.

[fol. 39] Before Workmen's Compensation Board

Form C-2

Employer's First Report of Injury—February 1, 1945

State of New York

Department of Labor

Division of Workmen's Compensation

Send notice on this form to Dept. of Labor at address on reverse side.

And to .....

Employer:

1. Name of Employer: South Buffalo Railway Company.
2. Office Address: No. and St. 2558 Hamburg Tnpke. City or Town: Lackawanna. State: New York.

3. Insured by: Self Insured.

4. Give nature of business (or article manufactured): Transportation.

Time and Place:

5. (a) Location of plant or place where accident occurred: Lackawanna, New York. Department: Transportation. State if employer's premises: .....

(b) If injured in a mine, did accident occur on surface, underground, shaft, drift or mill: .....

6. Date of alleged Injury: 7-1-44. Day of week: Saturday. Hour of day: 5:00 A. M. ..... P. M.

7. Date of disability began: 7-2-44. ..... A.M. ..... P.M.

8. Was injured paid in full for this day: Yes.

9. When did you or foreman first know of injury: At once.

10. Name of foreman: Edward Dockstader.

[fol. 40] Injured Person:

11. Name of Injured: (First Name) Thomas (Middle Initial) J. (Last Name) Ahern.

12. Address: No. and St. 3478 Clinton St. City or Town: Gardenville. State: New York.

13. Check (V) Married: x, Single: ....., Widowed: ....., Widower: ....., Divorced: ....., Male: x, Female ....., White: x, Colored: .....

14. Nationality: American. Speak English: Yes.

15. Age: 39. Did you have on file employment certificate or permit: .....

16. (a) Occupation when injured: Brakeman. (b) Was this his or her regular occupation: Yes. (If not, state in what department or branch of work regularly employed): .....

17. (a) How long employed by you: 3½ yrs. (b) Piece or time worker: Time; (c) Wages per hour: $ .....

18. (a) No. hours worked per day: 8; (b) Wages per day $ ..... (c) No. days worked per week: 7. (d) Average weekly earnings: Variable. (e) If board, lodging, fuel or other advantages were furnished in addition to wages, give estimated value per day, week or month: .....

Cause of Injury:

19. Machine, tool or things causing injury: .....
20. Kind of power (hand, foot electrical, steam, etc.): .....
21. Part of machine on which accident occurred: .....
22. (a) Was safety appliance or regulation provided: ..... (b) Was it in use at time: .....
[fols. 41-48] 23. Was accident caused by injured's failure to use or observe safety appliance or regulation: .....
24. Describe fully how accident occurred, and state what employee was doing when injured: Injured alleges that while switching cars he became sick to his stomach.
25. Names and addresses of witnesses: .....

Nature of Injury:

26. Nature and location of injury (describe fully exact location of amputations or fractures, right or left): Impression: Angina Pectoris.
27. Probable length of disability: ? .....
28. Has injured returned to work: No. If so, date and hour: ..... At what wage $ .....
At what occupation: .....
29. Did you provide medical attention: Yes. When: At once.
30. (a) Name and address of physician: Dr. T. E. Flemming, 3502 Clinton St., Gardenville, N. Y. (b) Name and address of hospital: None.

Fatal Cases:

31. Has injured died: No. If so, give date of death: .....

Firm Name: South Buffalo Railway Company,
Signed by: C. F. Dullenkopf,
Official Title: V. P. & G. S.
Date of this report: 2-1-45.

[fol. 49] BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE TO THE INDUSTRIAL COMMISSIONER THAT CLAIM WILL BE CONTROVERTED (TO BE FILED IN DUPLICATE)—February 1, 1945.

State of New York

Department of Labor

Office of the Industrial Commissioner, Bureau of Workmen's Compensation

Case No. 84414831-1
Ins. Carrier's No. 600

1. Name of employer: South Buffalo Railway Company.
[fol. 50] 2. Office address: 2558 Hamburg Turnpike, Lackawanna, N. Y.
3. Name of injured: Thomas J. Ahern.
4. Present address: Street and No.: 3478 Clinton St. City or Town: Gardenville, N. Y.
5. Date of alleged accident: July 1, 1944.
6. Nature of alleged accident: Injured alleges that while switching cars he became sick to his stomach.
7. This case will be controverted for the following reasons:

(a) For weekly wage?
(b) For rate of compensation?
(c) For period of disability?
(d) If controverted for any other reason, state fully below:

Question of accident and causal relation.

and reserves the right to controvert for such other reasons as may later appear.

8. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? (Yes or No) No.

Name of Insurance Carrier: South Buffalo Railway Company, Self-Insured.
Signed by C. F. Dullenkopf.
Official title: V. P. & G. S.
Dated: 2-1-45.

[fol. 51] BEFORE WORKMEN'S COMPENSATION BOARD

WAGE STATEMENT—September 19, 1945

Name of Employer: South Buffalo Railway Company.
Name of Claimant: Thomas J. A'Hern.
Occupation of Claimant: Brakeman.
Employment No.: 600.
Earnings for one year preceding injury: .....
Date of Injury: July 1, 1944.

. . . . . .

Earnings: 2535.22.

. . . . . .

[fol. 52] Earnings: Per Day: 8.86.
Compiled by: D. R. Daig.
Date: 9/19/45.
Approved: J. F. Craig, Division Accountant.

BEFORE WORKMEN'S COMPENSATION BOARD

NOTICE TO THE INDUSTRIAL COMMISSIONER THAT THE PAYMENT OF COMPENSATION HAS BEEN STOPPED OR SUSPENDED—December 4, 1945.

C-8

. . . . . .

[fol. 53] 5. Date of accident: July 1, 1944. Date disability began: July 2, 1944.
6. Date compensation began: July 2, 1944.
7. Compensation paid to: June 6, 1945.
8. Period of actual disability: 48-2/6 weeks.

. . . . . .

In accordance with award of 9-24-45. Total: 1353.33.

. . . . . .

[fol. 54] 14. On what date was the first compensation payment made? 12-4-45. Date of last payment: 12-4-45.

Name of Insurance Carrier: South Buffalo Railway Company, Self Insured.

Signed by: C. F. Dullonkopf,

Official title: Vice-President & General Supt.

Dated: Dec. 4, 1945.

BEFORE WORKMEN'S COMPENSATION BOARD

MINUTES—March 6, 1945

Thomas J. A'Hern,

South Bflo RR. Co.,
Self Insured

84414831

Hearing before the Workmen's Compensation Board held at Buffalo, N. Y. on March 6th, 1945: Mr. B. A. Oddo presiding as Referee. Claimant present. Atty. William Fay representing Employer. Atty. M. Weimar representing Claimant. Mr. A. J. Merkley present for Employer.

[fol. 55] Referee: What is the controversy?

Carrier: No accident. Disability not due to accidental or occupational disease.

Claimant's Atty.: Of course we claim there is.

Referee: Will we require other proof beside the claimant?

Carrier: I assume so.

Claimant's Atty.: There were some fellow employees.

Carrier: Yes. The proof will have to be submitted.

Referee: We will adjourn it for testimony of claimant, fellow employees——

Claimant's Atty.: And physicians, I assume.

Referee: What doctors will you have?

Claimant's Atty.: His doctor was Flemming.

Carrier: I think he is the only doctor that saw him so far as that goes. If there is any extra testimony necessary after the other is in——

Claimant's Atty.: I just got into it.

Referee: —and Dr. Flemming under 13F. Allow one-half hour.

Claimant's Atty.: I assume so.
Carrier: Yes.
Decision: Adjourned for testimony of Claimant, fellow employees and Dr. Flemming under 13F. Allow one-half hour.

(This is a certified and correct copy of transcription of minutes.
Transcription of minutes completed 2-28-49.)

Ethel W. Adams, Hearing Stenographer.

[fol. 56] BEFORE WORKMEN'S COMPENSATION BOARD

Minutes, March 27, 1945

State Department of Labor, Workmen's Compensation
Buffalo, N. Y., March 27, 1945

Case No. 84414831

THOMAS J. A'HERN, Claimant,

SOUTH BUFFALO RR. Co., Employer,

SELF INSURED, Carrier

Hearing before the Industrial Board

Present: Mr. B. A. Oddo, Referee; E. W. Adams, Hearing Stenographer

APPEARANCES:

Claimant. Atty. M. Weimar, 1044 Ellicott Sq., Buffalo, N. Y., representing Claimant.
Atty. W. Fay, Marine Trust Bldg., Buffalo, N. Y., representing Employer.
Mr. A. J. Merkley, present for Employer.

WITNESS:

Dr. Theo E. Flemming, Gardenville, N. Y.
Claimant. Martin McDonough, 350 Third St., Lackawanna, N. Y.

[fol. 57] Alfred Buil, 513 Riley St., Buffalo, N. Y.
John Pawlak, 23 Franklin St., Lackawanna, N. Y.
Decision: Dr. Flemming's fee is fixed at $10.00 plus mileage to Gardenville. Adjourned for testimony of Dr. Flemming under 13F and Mr. Dockstader.

Referee: This case is controverted, no accident, disability not causally related to accident or occupational disease. You may proceed, gentlemen. Mr. Fay expresses a desire to examine the claimant first before the doctor.
Employer's Atty.: I will waive it in this case.

Dr. Theo E. Flemming, Gardenville, N. Y., being duly sworn, testified as follows:

By the Referee:

Q. You are duly licensed to practice medicine in the State of New York?
A. Yes.
Q. Graduate of what university and when?
A. University of Buffalo, 1907.
Q. Specialize in any branch?
A. General Medicine.
Q. Authorized to treat compensation cases?
A. Yes, sir.
Q. What are your letters?
A. XCM 516.

Referee: You may ask.

By Claimant's Atty.:

Q. You know Thomas J. A'Hern sitting here?
A. Yes.
[fol. 58] Q. Did there come a time—what is the date there? Will you please——

Referee: July 1st.

Q. —last July when you treated him?
A. Yes.
Q. Can you tell us approximately what time of day it

was you treated him and what you discovered and where he was?

A. It was in the morning, July 1st.

Q. Approximately what time?

A. I should judge around 6 or 7.

Q. In the morning?

A. Yes.

Q. Was he at home at the time?

A. Yes.

Q. He lives in Gardenville?

A. Yes.

Q. Where was he—in bed?

A. I can't recall whether he was in bed or lying on the davenport.

Q. What was your—what did you find?

A. Well, he had considerable chest pain.

Q. What part of the chest?

A. Substernal and complaining of pain up the left shoulder and down the left arm.

Q. Did he tell you anything as to when he sustained this?

A. About 4 o'clock that morning he had been pulling some switches. He worked for some railroad company and he pulled some switches and then as he blocked a ladle—I imagine one of these steel ladles—he blocked that and as he did that he got pain in his chest which went up the shoulder and left arm and then became nauseated and sick and a little short winded.

Q. From that statement and your findings otherwise that day what was your diagnosis?

A. Acute coronary occlusion.

[fol. 59] Q. Could that—was that—was there causal connection in your opinion between the condition you found and the switching that he mentioned to you?

A. Yes.

Claimant's Atty.: That is all.

Referee: You may ask. How long thereafter did you treat him?

A. I am still treating him.

Referee: Is he able to work?

A. No.

Claimant's Atty.: That is all. Thank you.

Referee: It is a very unsatisfactory way of developing a case. The claimant should have testified as to his activities unless the doctor knows whether there was anything unusual about his activities that day which caused this occlusion.

By the Referee:

Q. Doctor, do you know whether the activities which the claimant described to you were his usual activities or work?

A. They were his usual activities. He told me that the switches that he worked, was throwing just before he blocked the train, that he got a little weak at throwing the switch. It seemed to stick and he had to pull a little harder than usual to throw the switch. I don't know much about what these switches are like. He said finally he had to kick the switch.

Q. Doctor, do you have an opinion with reasonable medical certainty as to whetrer this unusual action on the part of the claimant in the performance of his work is a com-[fol. 60] petent producing cause of the coronary occlusion?

A. Yes, it is.

Q. What is your opinion?

A. That it is a competent reason.

Referee: Any further questions?

By Employer's Atty.:

Q. Are you aware generally of the duties of switchmen? Do you know what they do?

A. Yes, in a general way. There is considerable——

Q. Considerable heavy work?

A. In throwing a switch.

Q. I don't suppose the switches throw, as far as you know, the same as others.

A. I wouldn't imagine they would.

Q. It wouldn't be unusual?

Referee: Are you qualifying him as a railroad man?

Employer's Atty.: I want to find how much he knows.

Referee: He is willing to speculate like all of us. We have a certain degree of experience——

Employer's Atty.: Here you have gone ahead and you have asked what history he got and he says——

Referee: You may examine on the question of history. I don't believe——

Employer's Atty.: I will put it this way. Do you know enough about the business of switching to know whether the fact that one switch pulls harder than another is anything other than the usual any switchman runs into?

[fol. 61] Referee: Do you know of your own knowledge or is it hearsay?

A. Well, I never pulled switches, but hearsay through years of association with railroad men.

Referee: I don't think the doctor is competent.

Employer's Atty.: I don't think he is competent to express an opinion as to whether or not that statement merely that the switch seemed to pull a little harder, as to whether or not there was sufficient exertion over and above what ordinarily happens every day, to express an opinion.

Referee: His competency is attested to by a license by the State of New York to practice medicine and license in this Department to practice medicine.

Employer's Atty.: I am going to stop my cross examination of the doctor at this time and ask to have him return for further cross examination after the lay testimony has been put in the case.

Referee: I think we have had the doctor waiting too long now.

Employer's Atty.: I do too.

Referee: Doctor, your fee is fixed at $10.00 and when you come in again we will try to expedite your attendance here and you will be paid again.

A. All right.

Claimant's Atty.: Thank you.

Referee: Plus mileage. Fee is fixed at $10.00 to Dr. Flemming plus mileage to Gardenville.

[fol. 62] Testimony of T. J. A'Hern, Claimant, being duly sworn, testified as follows:

By Claimant's Atty.:

Q. How old are you?

A. Forty, January 16th.

Q. When did you go to work for the South Buffalo Railway Co.?

A. I passed the doctor on the 11th of February to go to work.

Q. What year?

A. 1941, but I didn't go until two days later, which was the 13th of February.

Q. What doctor did you pass?

A. At the Steel plant.

Q. That is with the South Buffalo?

A. No, the Steel Plant.

Q. What steel plant?

A. Bethlehem.

Q. What is the connection with the South Buffalo?

A. I believe it is a subsidiary.

Q. Did he give you a thorough examination?

A. Yes, sir.

Q. And what job did you go to work on two days later?

A. On the 13th of February I went to work as switchman for the South Buffalo Railway.

Q. Did you work steadily and constantly up until the day of this occurrence?

A. Yes, sir, with occasionally taking a day off.

Q. For how long a period of time was that that you worked? What were your hours weekly?

A. I was on the extra board. You are called for service any time. Sometimes I would work days, sometimes afternoons and sometimes nights. There was no regular schedule for a number of years until, I would say, about eight or nine months, possibly ten months I held the reg-
[fol. 63] ular job nights.

Q. Whether they were an extra board were you working practically day by day for a period of several years?

A. Yes, unless I had a cold or grippe or something. I would take a day or two off, a few days.

Q. During that time prior to this particular day in July

did you ever have—did you have any other illness while on the job of a similar nature?

A. Never while I worked there at all.

Q. Tell us what time you went to work on this—that day, that work day when this happened?

A. I went to work the last day of June.

Q. What time of day?

A. 11 o'clock.

Q. At night?

A. At night. That would be the last day of June, but as the day progressed it was July. We worked on the last day of June and this was July. It was in the vicinity of 4 o'clock just before we went to lunch.

Q. What work were you doing?

A. I was hind end man of the crew.

Q. What were your duties generally?

A. Throwing switches, acting as switchman.

Q. And you did that that particular night?

A. Yes.

Q. What happened while you were on the job there?

A. Nothing happened. We were coming in. We had spotted the different furnaces. We got to the "C" furnace.

Q. Were you working down in the steel plant district?

A. Right in the blast furnaces.

[fol. 64] Q. What were your specific duties? Put that on the record, will you?

A. To throw switches and give signals, to spot these ladles to the furnaces.

Q. Did you have to bend and pull?

A. Yes.

Q. What happened immediately before the moment or time when you became ill? What were you doing?

A. Sitting on the engine going down the east side track to cross over in front of "C" furnace. There is a switch there. So naturally, me being on the end part, I got off to throw the switch.

Q. Did you jump off?

A. Stepped off.

Q. Then what?

A. When the switch—sometimes it would throw hard and sometimes easy.

Q. How was this switch?

A. This seemed to stick and as I tugged and jerked——

Q. You pulled with your hands?

A. I started with my left hand to throw it and I couldn't. I got it just up seven or eight inches when I had to put two arms and give a good jerk.

Q. What were you for height and weight at that time?

A. I weighed about 190 to 195.

Q. How tall?

A. I guess I was about 5' 9", 9½".

Q. Go ahead. Then what occurred when you were pulling with both hands or arms?

A. I am turning it over and someone on the engine——

Q. Did you put much force in it?

A. Yes, sir, I tugged.

Q. By the way you are talking and the sounds of your voice——

[fol. 65] Employer's Atty.: Wait a minute.

Claimant's Atty.: That does appear——

A. Sometimes cinders get under the plates.

Q. You are talking of the switch?

A. Yes, on the track. There is cinders get under. That causes the switch to throw hard, or either there might have been a stone in between.

Q. It stuck?

A. Yes. I had to put a lot of pressure to get the switch over.

Q. How long did it take you to pull it?

A. I would say about a minute and while I was pulling someone on the engine said "What is the matter, A'Hern? Are you getting weak in the pants?"

Q. Do you know who that was?

A. I couldn't say definitely whether it was the engineer or McDonough.

Q. Who were the men working with you that night?

A. In the switching crew was Pollock and McDonough beside myself.

Q. Who else?

A. The engineer and fireman.

Q. What are their names?

A. Buil and Cheffler.

Q. Who else?

A. That is the full crew.

Q. Then after you got through pulling just tell us everything you did until you stopped work?

A. Then, to get the switch down, that is, on to the lug so the switch wouldn't jump back I had to jump on it in order to put the lug down.

Q. Tell us how you jumped?

A. With my whole body.

Q. With both feet?

A. Yes. Then I started to feel weak when I did it, so I walked away.

[fol. 66] Q. When you say "I felt weak" what do you mean?

A. I don't know. You feel like you want to faint or something. That is the feeling that came over me. I walked over and started to rub my face.

Q. In the meantime they are pulling the engine to spot these ladles?

A. Yes.

Q. The crew?

A. Yes. As I come behind I spot ladles. I started to feel dizzy. I started to rub my face.

Q. How long after you pulled the switch and jumped did you commence to feel your face and feel otherwise anywhere?

A. Within a minute. It seemed to take me——

Q. Carry on. Tell us everything you did?

A. I felt I wanted to throw up. I didn't want to let on that I was sick in front of them, so I immediately went to the bathroom in the Welfare Building. Then I started to get wobbly and dizzy. I am throwing up. Everything seemed to—I figured I better get out of here before I pass out. I felt I wanted to faint. Just at that time—I figure it was Marty McDonough—said "What is the matter?" He was getting undressed to take a shower and I said "I can't talk".

Q. Were you not able to use your voice?

A. He said to get out and get air. He went across over to the yardmaster's office and said "You better call the Dispensary or something."

Q. Who is the yardmaster?

A. Mr. Dockstader.

Q. You don't know that?

A. I was sitting outside then. The doctor came over. He said "What is the matter?" I said "I don't know." I [fol. 67] could understand everything that was going on but I couldn't talk. When the fellow came with the wagon he said—I remember him saying "Why don't you call the ambulance for that fellow?" He said "Let's get him over there. Something is wrong." They took me as far as the Dispensary and they put me in the ambulance there.

Q. Where did they take you?

A. To the Moses Taylor Hospital.

Q. What did they do for you there?

A. Nothing. He said to lay on the table.

Q. Some doctor there?

A. I believe so. He must have been a doctor. He was dressed in white. After I laid down a few minutes I started to feel better. So I says to him "What is really wrong with me?" He says "You have an occlusion". In the meantime he had asked me "Where do you feel sick?" and I said "Lately I have been having pains in my neck and arms.

Q. Lately?

A. Yes. I said, after I started to revive I said "I have pain in my neck and my arms". He said to the nurse——

Q. "Lately" is after the accident?

A. Yes. So he said to the nurse "Make up a bed". I said "I feel pretty good and I prefer to go home, if you don't mind". So he said "If you want to go home, all right." So he said "Call the yardmaster and get someone to take you." So I went back in my car. As I was driving home I had to stop the car and get out of the car a few minutes and then I continued home and I could hardly make the stairs and I [fol. 68] told my wife to call the doctor immediately.

Q. Who did she call?

A. Dr. Flemming, the doctor that was just here.

Q. Have you been under his treatment ever since?

A. Ever since I have been under his treatment.

Q. Have you done any work since?

A. No. I haven't.

Claimant's Atty. That is all.

By Employer's Atty.:

Q. You worked steadily as switchman, either extra or otherwise, I take it from February, 1941 up to the time that you were ill?

A. Yes that is right.

Q. And what is the regular shift, eight hours?

A. Sometimes. The last night I worked they called me up and asked me if I cared to double up and I wanted to co-operate.

Q. You did the same type of work?

A. Yes, sir, same work.

Q. I would gather that one of the most important jobs and one of the jobs you performed most often as switchman was pulling switches?

A. Practically, aside from cutting.

Q. Was this particular run or whatever you call that you were on——

A. Cinder run.

Q. This particular job of hind-end switching?

A. Yes.

Q. As the particular duties?

A. Yes sir.

Q. How many times during eight hours would you be called on to throw a switch?

[fol. 69] A. That varies. You work in between the three. Most generally the conductor, if he is willing he will throw a switch if he wants to co-operate with you a little.

Q. He sits at the window and watches the dumping?

A. Or work with the rest of the crew. Some do and some don't. It is up to them.

Q. Can you give me any idea of the normal day's work?

A. He would throw an average of 35 or 40 switches probably.

Q. Are they all of them of the same general type of construction? Do they throw the same way?

A. No, some throw easy.

Q. I don't mean that. Are they hand switches where you perform the same operation to throw them?

A. Yes.

Q. They are all hand switches?

A. Yes.

Q. They do vary as to the ease with which you can throw them?

A. Yes.

Q. Was this particular switch that you were throwing at the time you felt sick, was that known to you to be harder to throw than others?

A. I would say "Yes" because they are at the furnace and slag gets under the track and there is plates right there that the track would move over and there is cinders and sand and different things that get under.

Q. So it is not too unusual to find one of those switches at that point in that shape?

A. In fact I have worked at other railroads. The only time you get trouble with others is when they have snow under.

[fol. 70] Q. That was quite the usual condition for this switch located there to be harder to throw than other places because of the stuff——

A. Because of the slag and stuff.

Q. Was it at all unusual so far as that switch in this area there to have to use both hands to throw it?

A. I have to throw other switches with both hands at times.

Q. And pull and tug on them?

A. Yes, sir.

Q. Did this switch throw any harder than other switches that you had to throw?

A. That night, yes.

Q. The hardest you ever threw?

A. I wouldn't say it is the hardest. There is a lot of switches that you would pull on that would have been stuck too.

Q. And you couldn't throw at all even if you tried?

A. That is right.

Q. But the proposition to the switchmen there under those circumstances the finding a switch with this slag or something in it and having to tug with two hands to throw it, that wasn't unusual?

A. No, it is not unusual.

Q. When you got near this place did the engine stop?

A. Naturally.

Q. How close to the place where you were throwing it did it stop?

A. I would say the engineer would be twenty-five feet away.

Q. The engine back?

A. I don't mean the front of the engine. I would say the front of the engine would be seven feet away.

Q. You were riding on the step in front?

A. Yes.

[fol. 71] Q. Was anybody else riding in front?

A. The conductor and the draw-bar man.

Q. While you were operating this whoever said this to you about were you getting weak or something was one of those on the step?

A. It could have been the engineer or one of the crew.

Q. You didn't recognize the voice?

A. Not right now I couldn't say definitely.

Q. You haven't any recollection?

A. I heard it. I was busy. They said "What is the matter? Are you weak in the pants?"

Q. Did you reply?

A. No. They are always joking and kidding.

Q. You don't know which one?

A. No.

Q. After that before you went in for the purpose of eating your lunch you blocked the ladle?

A. Yes.

Q. Is that one of your duties?

A. It varies, sometimes. 4:00 to 4:30 we go to lunch.

Q. You didn't say anything to anyone about feeling bad?

A. Until I got inside because I am last of the crew to go in, number 2. Most generally the conductor goes to the yardmaster's office. The draw-bar man is probably in a minute ahead of me before the ladles are blocked, but I had been quite sick trying to make the bathroom.

Claimant's Atty.: May I ask something?

Employer's Atty.: Yes.

By Claimant's Atty.:

Q. When you were talking—How many times did you pull or tug?

A. I would say it was a minute and a half before I got it over.

[fol. 72] Q. You were using full force all the time?

A. Yes. I had to.

Employer's Atty.: How many times did you tug at it?

A. That I couldn't say.

Employer's Atty.: Any idea?

A. No.

Employer's Atty.: A minute and a half is a long time?

A. You are darn right.

Q. Did it stop? Was it held back? Did something hold it back?

A. As I got it half way I had to put it over on this side and naturally it is easy to kick anything.

Q. You were on the left side?

A. Working this way. (Indicating.)

Q. From your left side?

A. Yes, and then I had to put both hands to pull and jerk it up five or six times. The switch was half way over and then I got on this side and give it a kick with my foot and before it got on the dog I had to jump on it a couple times to make sure it was locked.

Employer's Atty.: How many times did you tug before you got it up even?

A. Definitely I couldn't say.

Q. What did you have to do blocking the ladle? What is that?

A. These ladles—that is where the slag goes out. While that hot slag is being run out off the ladles you don't run into the yard. You put a piece of wood under the wheel to keep it from running. That is what you call blocking.

[fol. 73] Q. How high from the ground was the step on the locomotive that you hopped off?

A. I would say about the height of this chair, 18 inches.

Employer's Atty.: You would be on the side of the engine throwing this switch where you would be visible to the engineer, if looking?

A. Yes.

Employer's Atty.: But not the fireman?

A. Yes.

Q. Just what was the first feeling that you had either in the course of pulling or after you got through pulling that switch? What did you feel?

A. While I was jumping on the switch I started to become faint. I don't know—it is sort of faintish feeling that came over me. I didn't pay much attention. I thought "What the Hell is wrong with me". So then while I was going over to spot the ladles that pain started to come up. I wanted to throw up and I felt sort of dizzy.

Q. That was immediately after you got through?

A. While I was stepping on the switch.

Q. You had not finished yet?

A. No, I was jumping on it when I became dizzy.

Claimant's Atty.: That is all.

Employer's Atty.: That is all.

By Claimant's Atty.:

Q. Are the cars moving when you are throwing the switch?

A. No, sir.

Q. What is the purpose of throwing the switch?

A. So the—We are coming down the west side track—so the engine could get across over on to another track. That is the purpose.

[fol. 74] Q. Is there a time element in which the switch has to be thrown so the car can be moved in there?

A. No.

Q. Suppose it took all day to turn that switch?

A. What do you mean "all day"?

Q. I asked you if there was a time element to turning the switch.

A. Naturally these ladles have to be put in the furnace.

Q. Could you take all the time you wanted?

A. No.

Q. Did you work with speed?

A. You don't work with speed on the railroad.

Q. Did you have to work on time?

A. You have to get them in there.

Q. A certain time?

A. A certain time these ladles are to be placed in these furnaces because they have to check the furnaces.

Q. There is other men's work depends on how fast you throw this switch?

A. Yes, sir, that is true.

Q. If this fellow kidded you about this work what would be the reason for his kidding? Were you too slow?

A. He meant I couldn't get it over, that I was weak in my pants.

Employer's Atty.: I don't think we should have him characterize what the man meant.

Q. Did anyone ever say to you that you were slow in the pants before that job?

A. We made different remarks to one another. Probably I passed a remark to him the day previous or something to get going or something like that.

[fol. 75] Q. At any event the remark was passed to you while you were tugging and fussing with this particular switch with which you became ill.

Employer's Atty.: Whoever it was it would be Pawlak or McDonough or the engineer?

A. Yes.

Employer's Atty.: I brought them at your request.

By the Referee:

Q. While you were tugging on this switch where was the locomotive?

A. About seven feet back of the switch.

Q. Was it waiting for you to *show* the switch in order to move?

A. The quicker I got that over the quicker the engine moved.

Q. So the engine and the men were waiting for you?

A. Yes?

Q. And that had to be done within a reasonable time?

A. Yes?
Q. Rather quickly?
A. Yes.

MARTIN McDONOUGH, 350 Third St., Lackawanna, N. Y., being duly sworn, testified as follows:

By Claimant's Atty.: -

Q. You know Thomas A'Hern?
A. Yes.
Q. Were you working for the South Buffalo Railway at the time he was last July?
A. Yes.
Q. What were you doing? What was your position?
A. Draw-bar man.
[fol. 76] Q. Were you on the same locomotive he was on?
A. That is right.
Q. With the crew he mentioned here before?
A. That is right.
Q. What work did he do there that night that you observed?
A. He was hind-end man. He had to take care of the switches on the hind end of the train.
Q. Did he throw quite a number of switches that night?
A. Quite a few.
Q. Do you remember the occasion when he threw this switch at this block ladle spot?
A. Yes. I just remembered what switch he is talking about.
Q. Were you listening to the testimony given this morning?
A. That is right.
Q. Did it refresh your recollection any?
A. Just then it did, yes.
Q. Have you talked to me about this matter at any time?
A. Out here in the hall to be introduced to you.
Q. And that is all?
A. That is the first time I met you.
Q. Just tell us what you observed there in reference to A'Hern pulling that particular switch that night and what happened to A'Hern.

Employer's Atty.: Ask him where he was.

Q. Where was this switch by the way?

Employer's Atty.: No, where he was.

Claimant's Atty.: I will get into that. I will strike out the whole thing.

[fol. 77] Q. At the time A'Hern was pulling on this switch where were you?

A. On the engine.

Q. Did you observe A'Hern working on that switch?

A. We were waiting for him to get it over, yes.

Q. After the switch was thrown where was it you fellows were going to take the locomotive?

A. On the east side of "C" furnace.

Q. Were you going to do anything?

A. Spot for ladles, yes.

Q. So while you were waiting for him he was pulling this switch etc.?

A. That is right.

Q. What did you see him do?

A. Well, he tried to get it over and he was pulling and pulling to get it over so far and then he put his foot on, which we have to do with them all.

Q. Did the switch from what you observed stick or seem to stick?

A. Yes, sure.

Q. Did he jump and pull in the way he has described here in this Court Room this morning?

A. That is right.

Q. It took him quite a while to really lock or open the switch or whatever the situation is?

A. Yes.

Q. Was he locking or opening?

A. Locking.

Q. Did you see him jump up and down?

A. He had to after he got it over so far.

Q. Did you hear anybody make any comment to him that he had lead in his pants or was weak?

A. I don't know. We were kidding right along. It could have been me for that matter. I don't just recall now.

[fol. 78] Q. What did you observe with reference to

A'Hern? What did you observe—that A'Hern was ill and looked peculiar after the switch was thrown?

A. I didn't know anything. He didn't seem to be—I was in the Welfare Building before him.

Q. It was dark out there?

A. Yes.

Q. In the Welfare Building it was lighted?

A. Yes.

Q. How long after the switch was thrown did you fellows get in the Welfare Building?

A. We were spotting them. I didn't wait for him to spot the ladles. I got out before he got through. The conductor went to the yardmaster's office. Bud—I imagine he came in a minute or two behind.

Q. Bud is A'Hern?

A. Yes.

Q. Did you notice he looked bad?

A. I was taking a shower.

Q. What did you see?

A. I looked at him and I figured he was sick. He didn't look good to me.

Q. How did he look?

A. Pale in the face and just about all in. I said "I will be out in a minute when I get my clothes on." I went out. He said "I don't feel good." I said "I will—" I got Dockstader and Buil came over.

Q. Early that night what was A'Hern's appearance as to health and physical condition?

A. O.K.

Q. He looked that way to you?

A. Yes.

Q. After he pulled this switch he looked different?

A That is when it happened, yes, sir.

[fol. 79] Q. Did you go over and tell Mr. Dockstader to call the ambulance?

A. I asked him to look at him. 'Dockstader," I said, "there is something wrong with Bud. What it is I don't know. You better come over.

Q. Did he come over?

A. Yes, and Mr. Buil.

Q. What happened?

A. I don't know. They took Mr. A'Hern to the Dispensary. I don't know what happened after that.

Claimant's Atty.: That is all.

By Employer's Atty.:

Q. How long have you worked for the South Buffalo?
A. About four years.
Q. Switchman?
A. Yes, sir.
Q. Part of your duties to throw switches?
A. Yes.
Q. So you are entirely familiar with it?
A. Yes.
Q. Did I understand you to say it was customary practice after you got the lever or whatever it is pulled up to push it over with your foot:
A. Yes, you go so far. It is easier with your foot.
Q. So there is nothing unusual about that method of doing it?
A. That is right.
Q. You watched him throwing that switch?
A. Yes.
Q. You are familiar with the throwing of switches?
A. Yes.
Q. Did it appear to be more effort to throw it than a lot of switches you throw every day?
[fol. 80] A. You can run across a lot of them. Slag spills all over them.
Q. Was he working any harder than you or he ever worked?
A. We all get them as they come up.
Q. Have you pulled over switches in the regular course of your employment that pulled as hard as this one?
A. Lots of them, yes. I didn't know that was the trouble then. He was all right all night.
Q. From your observation of his pulling of that switch it wasn't pulling any harder than lots of switches you have seen?
A. No, about the same.

Employer's Atty.: That is all.

By the Referee:

Q. It was dark?
A. Yes.
Q. You couldn't see. You couldn't observe whether he was exerting any effort, extra effort?
A. He was, or the switch would come over. Some you pick up and they drop over. Some you have to jerk and then you put your foot on.
Q. Did he appear to exert extra effort on this?
A. I didn't take any notice of that.
Q. It was too dark?
A. Yes, it was dark.
Q. You noticed he was jerking this one?
A. Yes.
Q. As you said before, a good lot of the switches come over without any effort at all?
A. Yes.
Q. Those switches you don't jerk at all?
A. That is right, some of them.

[fol. 81] By Employer's Atty.:

Q. How far were you from him?
A. I don't know, maybe five or ten feet, just to get in the clear.
Q. You could see what he was doing?
A. Yes. We were talking back to him.

Referee: You are still working for the railroad?

A. Yes.
Q. As I gather you have switches out there according to their condition that pull with varying degrees of effort?
A. Yes.
Q. But you saw nothing, as I understand, about the way that he was exerting that seemed any harder than lots of switches?
A. Lot of them are hard.

By the Referee:

Q. On pulling switches are there some that pull easy?
A. Yes.

Q. And are there others that require all the effort you can put in?

A. Where this slag is because this spills on them.

Q. You have to pull with all your effort?

A. Yes. Sometimes they are froze with that hot slag.

Q. This last switch that he was working on was in the neighborhood of where the slag was?

A. Yes, sure.

Q. And where the slag spilled over?

A. Yes. Of course not right there. It could have been some other train.

Q. As you said before, wherever the slag was spilled over that made the switching harder?

A. Yes.

[fol. 82] Employer's Atty.: You were on the regular trip?

A. That was our regular run.

Q. Do it every shift?

A. Yes. Three engines go out there.

Employer's Atty.: I guess that is all.

Referee: Next witness.

By Claimant's Atty.:

Q. Was that the first time that switch was pulled that night?

A. I don't know. That could have been thrown. I don't know how many times. There is three engines go that.

Q. But you don't know?

A. It is always hard. The same switch is always hard.

Q. This particular switch on which he was working?

A. Yes.

Q. It is always hard to throw?

A. Yes.

Q. The one he was working on just before he felt sick?

A. Yes.

Employer's Atty.: It is known to you switchmen as one of the hardest switches to throw? It is always hard to throw?

A. Yes. Anywhere that slag spills is hard. It can't be avoided.

Employer's Atty.: That is all.
Claimant's Atty.: That is all.
Referee: Next witness.

[fol. 83] ALFRED BUIL, 513 Riley St., Buffalo, N. Y., being duly sworn, testified as follows:

Referee: You may ask.

By Claimant's Atty.:

Q. You work for the South Buffalo Railway?
A. Yes.
Q. How long have you worked there?
A. Nine years.
Q. What is your position?
A. Locomotive Engineer.
Q. Were you engineer on the locomotive upon which Thomas Ahern and Martin McDonough were this night of July 1st last?
A. Yes, sir.
Q. Did you observe Mr. Ahern when he came to work that night or shortly after he came to work or during the course of his work?
A. Yes.
Q. How did he look before this particular switch that has been testified here was pulled?
A. O. K.
Q. Did you see him pull that switch at the block ladle?
A. I stop sometimes and watch them and sometimes I have other duties to perform.
Q. Do you remember whether you watched that night?
A. That I can't say.
Q. What was Ahern's position on the locomotive that night?
A. Hind-end man.
Q. The hind-end man has to get off and open up the switches or lock them?
A. That all depends which side you are on.

Q. On his side?

A. Yes.

[fol. 84] Q. Do you remember going down to the place where the block ladle was?

A. Yes.

Q. Do you remember Ahern pulling that switch?

— —

Q. See anything?

A. He had to get off and throw the switch.

Q. Did you observe him while he was throwing the switch?

A. That I don't recall.

Q. Thereafter did you see him anywhere after the switch was pulled or thrown? Did you see him in the Welfare Bldg. or any other place?

A. After he threw the iron?

Q. When you say "throw the iron" you mean throw the switch?

A. Yes.

Q. Where did you see him?

A. We spotted the ladles. He spotted the ladles, locked them. We cut the engine off and I pulled up and stopped and went to lunch.

Q. Did he go in there after you fellows went in?

A. I went in the yardmaster's shanty.

Q. Did you see him thereafter at any time after that block ladle switch was thrown, or after he took charge of the last switch?

A. After he took off he spotted the ladle and then we went to lunch. He went toward the Welfare Building.

Q. Did you see him thereafter before he was taken away in the ambulance?

A. Yes.

Q. When did you see him?

A. Mr. McDonough came over and said to Dockstader "You better come over and look at Ahern. There is something wrong with Ahern." I went at that time. When I got there he was sitting on a bench outside the Welfare Building.

[fol. 85] Q. How did he look?

A. He looked starey eyed. His eyes were rolling. That is the way he appeared to me.

Q. How was his face?
A. How was his face?
Q. About the color, did you notice the color? was there any perspiration or anything like that?
A. I don't remember. I remember him saying he was shaking all over.
Q. Who came with you then?
A. Mr. Dockstader.
Q. About how long was that after the switch was thrown?
A. Ten minutes, twelve, fifteen minutes.
Q. And then they took him away in the ambulance?
A. In a car.
Q. In an automobile?
A. Yes.

Claimant's Atty.: That is all.
Employer's Atty.: No questions.

JOHN PAWLAK, 23 Franklin St., Lackawanna, N. Y., being duly sworn, testified as follows:

By Claimant's Atty.:

Q. You work for the South Buffalo Railway?
A. Yes.
Q. That is connected with the Lackawanna Steel plant?
A. Yes.
Q. How long have you worked there?
A. I would say about four and a half years.
Q. What is your particular job?
A. At that time I was conductor.
Q. You were conductor on this locomotive and yard freight?
A. Cinder run.
[fol. 86] Q. Were you conductor on the cinder run?
A. Yes.
Q. And Ahern was one of the switchman?
A. He was my hind-end man.
Q. Where were you riding that night?
A. On the front end of the engine.
Q. You heard this testimony here today about what

happened after Ahern pulled this switch at the block ladle?

A. Yes.

Q. Before Ahern pulled this switch you noticed him a number of times that night?

A. Yes.

Q. How did he appear? What was his physical condition?

A. He was all right when I saw him

Q. Did you see him pull this switch, this last switch?

A. I don't recall seeing him, but I know that switch always pulled hard.

Employer's Atty.: Did you observe him after the switch was pulled that night? Did you see him?

A. I don't recall seeing him.

Q. You didn't see him at all? Did you see him up until they took him away in an automobile?

A. No. When the switch was thrown he must have walked by to spot the west side. I rode with the engine to bring the ladles in. He must have walked ahead to line the switches so when I sent the engine back, but Ahern must have coupled on. In the meantime he is on the engine, but McDonough walked to the other side while I walked into the yardmaster's office.

Q. You didn't come to see Ahern thereafter?

A. No. I didn't know it.

[fol. 87] Q. You say you didn't know how he looked?

A. No.

Q. Were you there when McDonough ran over and said Ahern was sick?

A. No. I was in another Welfare Building talking with a friend of mine.

Q. As you say, that particular switch is always tough to throw?

A. Yes.

Q. And it required extra work and effort on the part of the men throwing it?

A. That is right.

Claimant's Atty.: That is all.

By Employer's Atty.:

Q. That was on one of your regular trips?

A. It was.

Q. That switch always has to be thrown on that trip?

A. It all depends. If you go in to that furnace it has to be thrown.

Q. There are other engines working?

A. Yes.

Q. That switch has to be thrown by South Buffalo employees—a number of employees do it quite often?

A. Yes. As I say, if there is another engine uses that, if you come to it, it is wrong and you have to throw it.

Q. So it is not unusual to find that switch in such condition you have to throw it?

A. Sometimes you can come by and find it is lined.

Q. Sometimes it is lined and sometimes not?

A. Yes.

Q. When it is not lined it has to be thrown?

A. That is right.

Q. What causes it to stick?

A. The slag and dirt that gets under the plate.

[fol. 88] Q. How often does the slag and dirt and stone get into the switch?

A. Well, it all depends on how the ladles are. Sometimes they are loaded with slag and it spills over.

Q. Does the effort with which you have to pull depend on the kind of slag, kind of blocking that has occurred on this switch?

A. If it is stone or a little dirt will cause the switch to stick.

Q. If it is dirt it doesn't require the effort that it would if there was slag?

A. It still does require a lot of effort.

Q. Is there a difference between the amount of effort that is required if it happens to be slag that has got in there?

A. It all depends. If the slag drops down and forms big hunks or chunks it is harder.

Q. Nobody knows what the condition was that night?

A. No.

Employer's Atty.: It is known as one of the hard switches?

A. Yes. I recall that switch always was hard to throw.
Q. How many times did you throw it?
A. Quite a few times. I don't know exactly the amount of times.

Employer's Atty.: You worked as a switchman for a while yourself?

A. Yes.
Q. Were you able to throw that switch with the same effort every time?
A. No, I had to put a little extra effort into it myself.
Q. Did it require more effort on one occasion than it did [fol. 89] on another occasion?
A. It usually did. It all depends on how the switch was.
Q. On the blocking of it—depend on how soon it had been thrown prior to your throwing it?
A. A lot of times, like I say, maybe some other engine went by and threw it and made it easier.
Q. The effort required would depend on the conditions?
A. That is right.

Claimant's Atty.: And this is right near where this slag was?

A. Yes.

By Employer's Atty.:

Q. You have other switches that are hard to throw?
A. Yes, I run across quite a few of them.
Q. This isn't the only switch that is hard to throw?
A. No, there is quite a few more.
Q. In use generally?
A. Yes.
Q. On the lines your train runs on?
A. I am not on the same job. I am working days. I got off.
Q. Was there any switch that was easy to throw?
A. Yes. A lot you step on and they go up themselves.
Q. What is the usual thing to expect, that the switch would throw easy or that it will stick and throw hard?

A. Well, I usually expect them to throw easy.

Q. Is that the case of your work at the South Buffalo?

A. Well, the work really is to throw the switch.

Q. Would you expect that most of the switches at the South Buffalo Railroad would throw easy?

A. Yes.

[fol. 90] Q. And did they?

A. Not all of them.

Q. Most of them?

A. Most of them throw easy, like I say.

Q. The ones that throw with effort have a varying degree? Some require more force than others?

A. Yes. I have already——

Q. Are there some that require all the energy that you can put to it all your might?

A. Yes.

Employer's Atty.: This is one of the switches that is noted for being that kind?

A. Yes. I have had to have a helper to help me.

Employer's Atty.: That is one that is noted as one of the hard ones.

A. That is right.

Claimant's Atty.: That is right.

Q. Even that one doesn't always require all your might?

A. It usually does.

Q. You say "usually". Does it always?

A. Like I say, if the engines keep using it they gradually break the slag up so it requires less.

Q. Does it require all your might?

A. Yes.

Q. Does the effort that you have to exercise in throwing this one switch depend upon the kind of stone or slag or whatever it is that is impeding the ease of throwing?

A. I don't know. I can't answer that question, but I know the switch always throws hard.

Q. If it is blocked by stone will it be harder?

A. Yes.

Q. Does it often get blocked by slag?

A. Yes.

[fol. 91] Q. When it is blocked by slag does it require more force?

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A. Yes.

Q. Are there times when it isn't blocked by slag?

A. No.

Q. Are there?

A. No, they are——

Q. It is always blocked by slag?

A. Generally, sure. The slag generally spills over.

Q. There are times when it isn't blocked by slag?

A. There is always slag in the switch.

Q. Why don't you answer the question. I am asking a very simple question. I am asking you if there is always slag that blocks this switch?

A. Yes.

Q. And is it always the same slag, the same degree of strength of the slag?

A. Yes.

Q. And does it always take the same force?

A. Yes.

Q. Regardless of the fact that that switch was thrown a half hour before it would take the same kind of force to throw that switch?

A. Yes.

Q. Do you know what you are talking about?

A. I do.

Q. Does it always require all your force to pull that switch?

A. Yes, it does.

Q. And do you have to wait to throw that switch regardless of who throws it?

A. Yes, you do.

Q. Earlier you said it depended on the kind of stuff that was blocking it. If it was dirt then it threw easy?

A. I didn't say it threw easy.

Q. It didn't require the same force?

Mr. Merkley: I think he said it did require the same force, your Honor.

[fol. 92] Q. Did you say it required the same force?

A. Yes, I did.

Employer's Atty.: I think you suggested the dirt proposition. This is the first time that it was more than slag.

Claimant's Atty.: Didn't you say if the switch had been thrown before-hand and a locomotive had ground this up before hand then it would throw easier? Didn't you say that here?

A. No, I didn't.

Q. Supposing it had been thrown before and the slag that was in there had been ground, would it take the same force to throw this switch as if it had not been thrown just a few minutes before or a half hour before and if the slag had not been ground up?

A. It would have the same force, yes.

Q. Exactly?

A. Yes.

Claimant's Atty.: So in your—according to your opinion the number of times that the switch was used in an evening or night wouldn't change the degree of strength which one would have to exert in order to move that switch?

A. No.

Q. How often have you thrown that switch?

A. I don't recall but I threw it quite a few times.

Q. How often?

A. About ten or twenty times.

Q. Ten or twenty times in four years?

A. I wasn't always on that job.

Q. How long were you on that job?

A. About six months, I believe.

[fol. 93] Q. In six months did you throw it twenty times?

A. Yes, maybe more.

Q. You are the one that is testifying?

A. I can't remember how many times. I can't go around the yard counting switches.

Q. Nobody is asking you.

Employer's Atty.: Please don't shout at the witness.

Claimant's Atty.: How much do you weigh?

Referee: Let's stay on the one question here.

Q. Are you excited?

A. No.

Q. Am I making you excited?

A. No.

Q. All we want is the truth. It seems to me that maybe I don't know what I am talking about. It seems to me that

after a switch is thrown once that it should not take the same force to throw it a second time. I may be in error on that. Now, it seems to me that this slag may get down and block the switch, but that once it is thrown and the slag has been crushed that it ought to be easier to throw. Am I in error on that?

A. No, it would be still hard to throw.

Q. Would it be just as hard as if the stone were hard?

A. Yes, it would.

Referee: O. K.

Employer's Atty.: That is all.

Referee: Next witness.

Employer's Atty.: I don't think there are any other witnesses.

[fol. 94] Claimant, testifying.

By the Referee:

Q. Mr. A'Hern, you have thrown this switch before?

A. Yes.

Q. Did it always require the same effort?

A. No sir, it didn't.

Q. Upon what did the effort that you had to exercise in throwing this switch depend?

A. Sometimes it would throw—you wouldn't say easy, but you could throw the dolly over. The switch you usually pick up with the left hand. You raise it about eighteen inches so you can get both hands on and throw over. But this particular moment when I got that far I couldn't get it up. So I kept jerking and tugging. When I got it half way it wouldn't fall over and I got on the other side and I jumped on it. I had to jump on it to get the lug down to lock it so the track wouldn't be run through.

Referee: Any further witnesses?

Claimant's Atty.: No.

Employer's Atty.: I don't think so.

Claimant: The yardmaster is here that took me to the hospital.

Referee: I think it is only cumulative evidence. I am perfectly agreeable to produce all the witnesses.

Employer's Atty.: All the witnesses have now appeared who were in a position to see you throwing that switch?

Claimant: That is right.

Referee: Adjourned for medical proof.

[fol. 95] Discussion off record.

Referee: Dr. Flemming's fee is fixed at $10.00 plus mileage to Gardenville. Adjourned for testimony of Dr. Flemming under 13F, and Mr. Dockstader.

(This is a certified and correct copy of transcription of minutes. Transcription of minutes completed 7-26-45.)

Ethel W. Adams, Hearing Stenographer.

BEFORE WORKMEN'S COMPENSATION BOARD

MINUTES—May 1, 1945

State Department of Labor

Workmen's Compensation

State Office Building, Buffalo, N. Y.

May 1st, 1945

THOMAS J. A'HERN, Claimant,

SO. BUFFALO R. R. Co., Employer,

SELF INSURER, Carrier.

Case No. 84414831

Hearing before the Industrial Board.

Present: B. Oddo, Referee

F. E. Brindler, Hearing Stenographer.

[fol. 96] APPEARANCES:

Claimant present with Atty. Matthew Weimar, Ellicott Sq., Buffalo.

Atty. Wm. Fay, Marine Trust Bldg., Buffalo, representing the employer (carrier).

WITNESSES:

Dr. Theo. C. Flemming.

Mr. Edward Dockstader, 66 Sidway St., City.

Cl. Atty.: Dr. Flemming is here.
Referee: Is he here?
Cl. Atty.: Yes.
Carrier: Are you all through?
Cl. Atty.: You were requested last time to bring your evidence.
Carrier: That's right after the facts are developed.
Referee: Were there any other facts you were going to develop?
Cl. Atty.: No.

Dr. Theo E. Flemming, 3502 Clinton St., Buffalo, being duly sworn, testified as follows:

By Referee:

Q. You are duly licensed to practice medicine in the State of New York?
A. Yes.
Q. Graduate of what university and when?
A. University of Buffalo, 1907.
Q. Specialize in any branch of the profession?
A. No.
Q. Authorized to treat compensation cases?
A. Yes.
[fol. 97] Q. And what are your letters?
A. 5838, X C M 5-16.

Referee: You may ask?
Carrier: You have nothing?
Cl. Atty.: No. Well I will ask him a few questions.

By Cl. Atty.:

Q. How often did you treat Mr. A'Hern after his heart attack last July?
A. Well, in the first week it was about two calls a day and then daily for a while and then every other day and every three days, every four or five days and then once a week and once in two weeks.
Q. Do you see him now from time to time?
A. Yes.

Q. Now in the course of your twenty-six or thirty-six years of practice as a doctor, have you had other occasions to treat people who have had heart attacks?

A. Yes.

Q. Coronary occlusions and so forth?

A. Yes.

Q. About how many occasions?

A. That I couldn't estimate, a great many.

Q. You have diagnosed the condition on those occasions?

A. Yes.

Q. And insofar as Mr. A'Hern is concerned, these symptoms that you observed on the day that you first examined him and shortly after the affair down in the railroad, were the same symptoms that you had observed in those other cases that you had?

A. Yes.

Q. Previously diagnosed?

A. Yes.

[fol. 98] Q. Well about how many cases in the years of your experience with heart conditions or heart attacks, have you treated?

A. Well I should estimate probably a hundred or more.

Q. And your diagnosis of his condition was that it was a coronary occlusion?

A. Yes.

Q. And as you testified here at the last hearing there was to your mind, a direct causal connection between the work he had been doing that day and the attack that he had sustained?

A. Yes.

Cl. Atty. That's all.

By Carrier:

Q. Did you have any history of any previous heart involvement?

A. With Mr. A'Hern, yes.

Q. Previous heart trouble?

A. Yes, about three or four years before.

Q. What did that entail?

A. Well the history that he had there, he had a fibrillation at that time and the history goes a number of years back

when he had a toxic thyroid which had affected his heart muscle and set up a myocarditis there.

Q. That goes back three or four years?

A. Yes, that goes back seven or eight years or more.

Q. What was the nature of the illness three or four years ago?

A. Well that was just a little fibrillation and a feeling of weakness that he would have at times.

Q. Did he see you at that time?

A. Yes.

Q. Did you at that time diagnose his case?

A. Yes, as a myocarditis.

[fol. 99] Q. Of the heart?

A. That's right, that is in the heart muscle.

Q. And apparently you felt that it wasn't severe enough to prevent him from doing the ordinary work?

A. Yes, he was able to come over to the office and in a short time his heart had been regulated, his rate had been restored to normal and he was able to continue his work.

Q. I assume that with that history, that ordinary heavy hard work might bring on another attack?

A. Well I wouldn't know because he had gone along for —this was I think in 1941—yes 1941 or 1942, see, that this thing occurred and he had gone along three years with a regular rate.

Q. As far as his ability to work right along and he had been working right along a number of years, he hadn't consulted you?

A. No, he hadn't consulted me during that time, and I would see him almost every day.

Q. From what you observed at that time and the history you had before that, it would be your opinion that subsequent to 1941 or 1942, he had what you call a normal heart?

A. Yes, I would think so.

Q. In other words, once he recovered from that attack in '41 or '42 he was actually just as good as ever?

A. Well as near as I could estimate in his line of work and exercise and that sort of thing, I would estimate that he probably was as nearly normal as the average heart is.

Q. In other words, that didn't do it any permanent damage?

A. No, I don't believe so.

[fol. 100] Q. And with that history he would not be more susceptible to further attacks on exertion than a person who had not had such a previous history?

A. Well I wouldn't think he would be any more susceptible than any other person would.

Q. In other words, you wouldn't feel that it was more reasonable with that history to assume that the ordinary day's work might bring on another one, just as if he hadn't had any?

A. No.

Q. Did you have any electrocardiograms taken?

A. Yes.

Q. And what did they show?

A. On July 2nd they showed an anterior wall infarction.

Q. Evidence of coronary occlusion?

A. Yes.

Q. But you see no association with that and the previous condition?

A. No, I wouldn't in the two of them.

Q. Either directly or indirectly, a heart that was not entirely normal because of the previous pathology?

A. No, I wouldn't, I couldn't in the two of them between that condition existing, his heart had been irritated by a thyroid, the thyroid had been removed and the irritation was gone. This heart in '41 for some reason or other became irregular and started fibrillating. The thing cleared up in a short time. If was not disabling at any time. that is, he wasn't in bed at any time. He came over to the office and the rate in a short time came down to normal, and apparently was normal. The blood pressure at that time was normal and there was no reason to suspect that he had a permanently damaged heart.

[fol. 101] Q. Was there any history at that time to account for that particular occurrence?

A. Yes, some excitement I think—so no I haven't any recollection of any exciting there.

Q. It just occurred?

A. It just occurred and I tied it up with a possible irri-

tation of a thyroid several years before and I found no definite reason at that time to blame for that.

Q. What has been his progress since July?

A. Since July the progress has been improving slowly. There are times when he feels a little bit worse than at other times. Sometimes his breathing and his heart rate are—well in fact they have been rather most of the time, have been a very normal rate and regular.

Q. You feel like what happened after the first occurrence he would get back in condition so that he would be able to do something?

A. No I don't believe so. This is different than what happened three or four years ago.

Q. But it is getting better?

A. Yes, there is some improvement. He is able to take a little longer walk than he had been and that is, his general condition has improved some but I wouldn't advise him to walk over long or to be up on his feet too long at a time or to do any heavy work.

Q. Is the improvement still apparent?

A. Well no, it is so gradual that you just simply leave it to him as to how long and as far as he is able to walk. In comparison with two or three months ago there is an [fol. 102] improvement, that is, without causing the pain to return.

Carrier: I guess that's all.

By Cl. Atty.:

Q. In your opinion then, Mr. A'Hern's heart condition as has been testified to, is a permanent one?

A. I believe so.

Cl. Atty.: That's all.

By Referee:

Q. And do you associate his present condition in any way with the condition which was created by the thyroid?

A. No.

Q. With the operation?

A. No.

Cl. Atty.: Thank you doctor. Mr. Dockstader.

MR. EDWARD DOCKSTADER, 66 Sidway St., Buffalo, being duly sworn, testified as follows:

Referee: This is the first time Mr. Dockstader appeared?

Cl. Atty.: As a witness. He was in the room the last time. He wasn't a witness.

Referee: You may ask Mr. Weimar.

By Cl. Atty.:

Q. Where are you employed?

A. South Buffalo Railway.

Q. And how long have you been with the South Buffalo Railway?

A. Five years, October 12th this year.

[fol. 103] Q. And what is your position there?

A. Yard master.

Q. And were you yard master for the South Buffalo Railway on the day when Thomas A'Hern suffered from the heart attack which has been testified to here?

A. Yes.

Q. Were you here in the court room at the last hearing about a month ago, were you not?

A. I was.

Q. What are your duties as yard master by the way?

A. Issuance of work throughout the eight hour period.

Q. And was this particular location, this was the "C" switch they call it, the switch at "C" furnace, is that right?

A. No, the certain switch they were talking about is a switch that leads up into another track, that would lead up into "C" furnace.

Q. In any event, you heard the conductor and the others testify at the last hearing did you not?

A. Yes, I did.

Q. Didn't they call it a particular name?

A. No, it has no particular name.

Q. Well in any event, this switch is near a slag, that is, a blast furnace?

A. It is right next to a blast furnace.

Q. And you heard the testimony that the cinders and stuff when it is hot will come through the air and fall around where the switch is, did you?

A. Well it is next to the track where we spot the ladle in the furnace and if the ladle comes in, that is shelled over [fol. 104] in any way at all when the slag is discharged from the furnace, it will hit on top of this shell and before it has time to burn a hole through, a certain amount of the slag will splash over, it splashes over on the switch.

Q. And from your experience what effect upon the workability of the switch does that slashing over this switch have?

A. It makes this switch hard to throw, hard to operate one way or another.

Q. Well from your experience with that switch does it operate uniformly with the same degree of ease or difficulty, or does it operate differently at different times?

A. Why it operates differently.

Q. Will you please tell us what your experience has been with reference to that switch from the stand point of its operation?

A. Not only that switch, any switch might work different any time that you go to throw it.

Q. Well that may be so but this particular switch concerning which there was testimony, the switch at which Mr. A'Hern was throwing that particular day when he last worked last July, does it—or didn't the fact that it was near the blast furnace and the slag, didn't the slag affect it in any way?

A. Yes, the slag would affect the switch.

Q. In what way, will you please tell us?

A. In making it throw hard but the switch may possibly throw easy. If we had a pretty good downpour of rain just before the slag had been on there, the rain would have [fol. 105] a tendency to wash the slag off the switch and it might act as a lubricant.

Q. Then it would throw easily?

A. It would throw easier, yes.

Q. If there wasn't any rain and the slag had hardened there the switch would throw hard would it not?

A. Yes it would and mostly all of the rest would after a rain, rust before they got a chance to be oiled up and they would all throw hard.

Q. Yes, is there any difference between this switch and others in proximity of the slag?

A. Well I imagine there would be according to the slag splashing on it.

Q. Well from your experience there?

A. Yes, that switch would throw harder than other switches that wasn't around to be splashed on, but of course, you wouldn't necessarily have that slag splashing on the switch to make it throw hard or easier either.

Q. Well sometimes this switch would throw easier in throwing it and other times it would require quite a bit of effort?

A. Yes, it would throw easier if it was just lubricated.

Q. Well depending upon the conditions, some occasions the switch would throw hard and other occasions it would throw easy?

A. That's right.

Cl. Atty.: That's all.

Referee: You may ask.

By Carrier:

Q. As I understand it Mr. Dockstader, if there was slag [fol. 106] on the switch that would have a tendency to make it throw hard?

A. That would, yes.

Q. And sometimes there was slag on it and sometimes there wasn't?

A. That's true.

Q. It isn't at all unusual for it to have slag on it?

A. No.

Q. And the switch was used daily was it?

A. Used constantly.

Q. Used constantly—in other words it was an ordinary procedure and sometimes you find it easy and sometimes you find it hard?

A. Yes, that and every other switch in the railroad yard.

Q. In other words, they all from time to time vary in degree of difficulty in throwing?

A. Yes, they would.

Q. And this is no different than any other, except this had a particular reason why it might be harder, namely the slag getting on it?

A. That's right.

Q. And that is not unusual for the slag going on it?
A. No, not in the position of that switch.
Q. In other words, for a switch to find it hard to throw?
A. No, I wouldn't say so.

Carrier: That's all.

By Cl. Atty.:

Q. But the presence of slag would make a difference than some of the other switches, isn't that right?
A. Yes it would but another switch where there wasn't slag on might possibly throw easy one time and hard the next.

Q. And that would be the situation with this switch?
A. Well I wouldn't know as it would be with this one, it would be with any switch.
[fol. 107] Q. You are familiar with this switch?
A. Yes, I am familiar with most of them.
Q. And sometimes this switch would throw easy and sometimes it would throw with great difficulty, isn't that right?
A. That's right.
Q. If a locomotive backed up and backed through the switch and almost broke through the switch, would that have any effect upon whether the switch would hop up at work or whether it wouldn't work at all?
A. You mean if a locomotive almost backed through the switch and broke it?
Q. Yes, what would the effect of that operation by the locomotive be upon the switch?
A. It might spring the switch.
Q. And what do you mean by springing the switch?
A. Bending the mechanical parts of it.
Q. And what would the effect upon the operation of the switch be if that happened?
A. Well after that had happened why the switch would throw easy one way and after it was latched it would come a certain distance and then it would be almost impossible to throw it.
Q. Yes, and aren't there certain conditions under which the switch would come back with great speed and strength

enough, sufficient to injure a man, injure his head or any part of his body that came in contact with it?

A. Yes, a switch that has been sprung and hasn't been unlatched, when they unlatch it, it is sprung so the mechanical part or the ball of the switch whips over fast.

[fol. 108] Q. Well, from your experience and knowledge out there in the South Buffalo Railway, isn't it a fact that there are a number of men who have been ruptured and suffered hernias by operating the switches?

A. Several that I have heard about.

Q. And any within recent time?

A. No, not that I can recall recently.

Q. And they suffered these ruptured conditions due to their working on the switches or on some switches, throwing the switches?

A. Just one case that I can recall where he was ruptured from throwing a switch.

Cl. Atty.: That's all.

Carrier: No questions.

By Referee:

Q. You are still working for the company?

A. Yes.

Q. You were here at the last hearing?

A. I was.

Q. And after the last hearing you discussed the operation of this particular switch with Mr. Weimar?

A. I did.

Q. And did you tell him that that switch worked harder than the other switches because of the slag conditions?

A. No. I told him that the switch might possibly work hard.

Q. Did you tell him that sometimes the slag would be embodied into the switch?

A. No, not embodied in the switch, I have never heard them get that bad.

[fol. 109] Q. Hold down on the switch and that it would be times when small particles of this slag would be into the switch and make the operation more difficult?

A. That's right, just small particles but never embodied in the switch.

Q. And have you discussed this case with any man in authority for the employer in order to get permission to come here today?

A. No I haven't.

Q. Is this your day off?

A. Yes.

By Cl. Atty.:

Q. Have you discussed this case with Mr. Fay or anybody associated with the lawyer here?

A. No, sir.

Q. For the employer?

A. No, sir.

Carrier: I never talked to Mr. Dockstader until now.

Q. So, since the last hearing you haven't discussed this case with anybody, is that right?

A. No, sir.

Q. Or the operation of that switch?

A. No, or the operation of any switch, in fact other than speaking to a few workmen who asked me how Mr. A'Hern was making out.

Q. Did you hear the referee's question that after the last hearing, tell me out in the hall that you disagreed with the testimony of Mr. Pawlak, the conductor?

A. I did disagree with that testimony yes. He contradicted himself in his testimony.

By Referee:

Q. In what regard did you disagree?

A. I disagreed because he said the switch would always [fol. 110] throw the same. You asked him the question several times, that a switch would always throw the same.

Referee: Anything further gentlemen?

Cl. Atty.: No.

Carrier: I would like this claimant examined by a heart specialist and adjourned for a report.

Referee: All right, and the claimant has a right to have his own doctor present and a doctor of equal standing with the doctor to whom they refer you.

Cl. Atty.: I want to make a statement for the record,

that at the last hearing another witness, Mr. Sledwell—what is he, a fireman?

Claimant: A fireman.

Cl. Atty.: He was present, he also talked to me. He was present at the hearing. He talked to me out in the hall and I notified the Board here that I wanted him in view of what he told me but he was notified was he not Mr. A'Hern?

Claimant: I did tell him.

Cl. Atty.: I told Mr. Dockstader to get in touch with him.

Referee: Well you can produce him at a subsequent hearing.

Carrier: Of course, I produced all the witnesses here at the last hearing. Why didn't he produce him? Didn't you say he was here at the last hearing?

[fol. 111] Cl. Atty.: At the last hearing, I will tell you why——

Referee: Let's not go into that gentlemen.

Cl. Atty.: He told me there would be a couple witnesses——

Referee: The carrier objects to taking the testimony. We will dispose of it.

Carrier: I am not objecting. I want it to appear that I had nothing to do with that witness.

Cl. Atty.: I disagree with you. Mr. Fay interfered——

Referee: I am going to find that Mr. Fay did not interfere in any way with any of the witnesses.

Adjourned for examination of the claimant by specialist at the request of the carrier, and you are advised as to what your rights are. It has got to be at the convenience of a doctor of the same standing and the claimant has a right to refuse to be examined by any doctor of the company unless the other doctor is present. Of course, you may want that right and you may be examined without his presence. After the examination the testimony of the doctor will be taken.

Carrier: I will get in touch with you.

Cl. Atty: All right.

[fol. 112] This is to certify that this is a true and correct transcript of the testimony taken at this hearing.

8-4-45.

Frances E. Brindler, Hearing Stenographer.

BEFORE WORKMEN'S COMPENSATION BOARD

Workmen's Compensation Board

State of New York

Buffalo, New York—May 22, 1945

Case No. 84414831

THOMAS J. A'HERN, Claimant; SOUTH BUFFALO RAILWAY COMPANY, Employer; SELF-INSURER, Carrier

MINUTES—May 22, 1945

Hearing Before The Workmen's Compensation Board

Present: Bart A. Oddo, Referee; Anne R. Munson, Hearing Stenographer.

Appearances:

Claimant Present.
Matthew Weimar, Attorney for Claimant.
A. J. Merklery, for Employer.
William Fay, Attorney for Employer.

[fol. 113] Witnesses: None.

Employer's Attorney: (Submits medical reports).

Referee: Is this all the evidence to be produced now?

A. That is as far as I know.

Claimant's Attorney: Well, we had Dr. Leopold make a similar check. I don't know what his findings are, but we will accept those.

Referee: Will you stipulate, Mr. Weimar, that I can consider the report of Dr. Nelson G. Russell, with the same force and effect as if it were verified?

Claimant's Attorney: And taken here in court, yes. If Dr. Leopold's report coincides, I will send it in.

Referee: I think you ought to have a separate report.

Claimant's Attorney: All right.

Carrier: It is obvious he cannot go back to South Buffalo as a switchman.

Referee: Subject to receiving report from Dr. Leopold, and any subsequent report by Dr. Russell, on the question of extent of disability, the evidence is closed?

Claimant's Attorney: That is correct.
Employer's Attorney: That is right.
Referee: And if the report of Dr. Leopold is not verified, may I consider the report in evidence with the same force and effect as if it were verified?
Employer's Attorney: Certainly.
[fol. 114] Referee: So you will get me that report?
Claimant's Attorney: Yes.
Referee: Decision Reserved—Minutes to be Transcribed.

Anne R. Munson, Hearing Stenographer,

(Certified true and correct transcript).

Transcribed 7/27/45.

BEFORE WORKMEN'S COMPENSATION BOARD

MINUTES—July 3, 1945

July 3, 1945

Buffalo

Workmen's Compensation Board

State of New York

Case No. 84414831

THOMAS J. AHERN, Claimant,

SOUTH BUFFALO RAILROAD CO., Employer,

SELF, Carrier

Hearing before the Workmen's Compensation Board.
Present: B. A. Oddo—Referee, E. J. Repp, Hearing Stenographer. (By: I. Oblas, Hearing Steno.)

[fol. 115] APPEARANCES:

M. Weimar, Esq., for Claimant.
Wm. Fay, Esq., for Employer—Carrier.

WITNESSES: None.

Case duly called.
Mr. Weimar: It is for consideration of Dr. Leopold's report. I believe he sent in the original.

The Referee: Have you anything further?

Mr. Fay: Mr. Weimar sent me a copy of it, and I haven't, so I guess there is nothing to do but rest on the record.

Mr. Weimar: There were two pages of the blood count and the metabolism and the report of May 5. Have you that?

The Referee: I have this here.

Mr. Weimar: I better come around here. Well, I didn't atfach the metabolism test. I better do that.

Mr. Fay: Yes, that's right.

Mr. Weimar: I will give you the sheets of the metabolism report, and then I will give you a copy of this.

Mr. Fay: Of course.

The Referee: These two sheets you handed me may be as transcribed here, to be transmitted——

Mr. Fay: To Dr. Leopold's original report.

The Referee: No objection?

Mr. Fay: None.

Mr. Weimar: At one of these hearings it was stipulated, wasn't it, that the reports of Dr. Leopold and Dr. Russell would be accepted as evidence under oath?

[fol. 116] Mr. Fay: That is right.

The Referee: Next time, the fact that the report of Dr. Francis D. Leopold is not verified, it is stipulated by the parties herein that the referee may consider it with the same force and effect as if it were verified. The same stipulation has already been made with respect to the report of Dr. Russell of May 21, 1945. Is that correct, gentlemen?

Mr. Weimar: That is correct.

Mr. Fay: Right. I guess neither one of us has any further evidence?

Mr. Weimar: No, I haven't.

The Referee: Evidence closed. Decision reserved. Transcribe minutes.

Transcribed November 15, 1949.

Certified to be a true and correct transcript.

(S.) Irving Oblas, C. S. R., Hearing Stenographer (transcriber).

[fol. 117] BEFORE WORKMEN'S COMPENSATION BOARD

MINUTES—January 8, 1946

Workmen's Compensation Board

65 Court Street, Buffalo, New York

January 8, 1946

Case No. 84414831

THOMAS AHERN, Claimant

SOUTH BUFFALO RAILWAY, Employer

SELF INSURANCE, Carrier

Hearing before the Workmen's Compensation Board.

Present: B. Oddo, Referee. M. Overstreet, Principal Hearing Stenographer

APPEARANCES:

Thomas Ahern, claimant, is present, represented by M. Weimar, 1044 Ellicott Square, Buffalo, New York. William Fay, representing Employer and Carrier.

WITNESSES:

The claimant.

[fol. 118] Case is called:

By the Referee:

Q. Mr. Ahern, you received some accident insurance?
A. Yes, sir.
Q. (Cont'g) Benefits?
A. Yes, sir.
Q. Under the insurance policy through which you received this sick and accident insurance, were those benefits payable for an accident which you sustained in the event that the accident was a compensable accident?
A. No; they were paying more as a relief plan. That is, for sickness.

Q. So that during the time you received those benefits, your employer felt that your accident was not compensable?
A. That's right.
Q. Now, under those circumstances——
A. Excuse me, but in the meantime, I have sent this in.
Q. You had made the claim?
A. Yes.

Mr. Weimar: May I intrude with one question?
The Referee: Yes.

By Mr. Weimar:

Q. You paid a certain amount per year or per month, did you not?
A. Yes.
Q. How much was that, approximately? What basis?
A. Two dollars a month.
Q. And that was under some arrangement or some contract or form that was filed with the company which you had never seen? Is that true?
A. They gave me a pamphlet.
Q. Some covering contract?
A. When you are hired, you sign this insurance policy; that's all.
[fol. 119] Q. And you were paid from your wages, so much per week?
A. That's right; two dollars per month.
Q. Or a proportionate sum to cover you in case of certain contingencies, whatever they may be?
A. Yes.

The Referee: Oh no, that isn't so, Mr. Weimar.
The Claimant: I don't know.
The Referee: I am familiar with those contracts, because in the City employment, we have group insurance, and unless the premium includes compensable accidents, the injured party does not receive benefits in the event that he is injured in a compensable accident.
Mr. Weimar: Well, of course, I am in the predicament of not knowing the facts. I appreciate that he received certain money—some Four Hundred and Fifty Dollars ($450.00) from the South Buffalo Railway. That he paid

a certain amount per month out of his earnings. That there is some general agreement—policy contract—whatever you call it—in the files of the company, the terms of which I am unfamiliar with. The only question was—and he raised the question as to whether or not—and it is a logical question—if he paid it in the shape of insurance, whether or not the company is entitled to deduct what would otherwise be compensation.

[fol. 120] The Referee: If this were paid through policy, then the claimant would have received benefits, even though the accident was a compensable one, then there could be no reimbursement and there cannot be a deduction. Under any circumstances, I cannot direct the claimant to reimburse a carrier for any advances made to him, regardless of the manner in which they were paid or the grounds upon which they were paid, however, if the claimant has received sick and accident benefits on the basis that the claimant did not sustain a compensable accident, then there is a moral obligation, also a legal obligation, on the part of the claimant to refund the money. The employer may institute an action to recover the monies.

Mr. Weimar: May I ask a question, then?

The Referee: Yes.

Mr. Weimar: If the employee, as in this case, pays a certain amount of money for a period of years, or any length of time, then he is injured and receives compensation, they pay him under that company policy, whatever the technical name may be, and that policy then is continued, as I understand it, in some manner it is being continued——

The Claimant: (Int'g) I have it here.

Mr. Weimar: (Cont'g) couldn't he retain the benefits and charge it against what he may get in the future? In other words; what is he paying for?

[fol. 121] The Referee: He is paying for sick and accident benefits.

The Claimant: Excuse me.

Mr. Fay: I can enlighten you.

The Referee: Mr. Fay may give us——

Mr. Fay: Primarily, he is paying on life insurance. This policy carries a certain fixed sum payable on death, like any life insurance. Also has sickness benefits, provided the lost

time is not due to a compensable accident for which he receives compensation.

Mr. Weimar: Then if it is life insurance, wouldn't there be yearly accretions against which this four hundred something is chargeable? Isn't there anything like that?

(Off record discussion.)

The Referee: We will adjourn this two weeks, for the purpose of clarifying the whole situation.

Mr. Weimar: All right; thank you.

The Referee: Adjourned two weeks for further consideration.

Note: Before leaving building claimant and interested parties return and case is recalled:

The Referee: Carrier's attorney returned and says that claimant has agreed to make restitution for payments received under accident policy and has endorsed the check. Under those circumstances, it is not necessary to re-schedule [fol. 122] this case in two weeks. The award now is from 6/5/45 to date at Twenty-eight ($28.00) dollars; continue until C-8 is filed.

Transcribed January 31, 1950.
Certified to be a true and correct transcript.

M. Overstreet, Principal Hearing Stenographer.

MINUTES—February 4, 1947

Case No. 84414831

THOMAS J. A'HERN, Claimant

So. BUFFALO RAILWAY, Employer

SELF INS., Carrier

Hearing held at Buffalo February 4, 1947, Referee B. Oddo.

Claimant not present.

Mr. Merckling appearing for the employer and carrier.

Referee: This case was placed on the calendar at the di-

rection of Mr. Platz as it hasn't been heard within the past year. Just continued it under C-8. I award claimant compensation from 1-8-46 to date at $28.00 and continued until C-8 is filed.

[fol. 123] Carrier: O. K.

Referee: I don't suppose you want permanency in this case at this time?

Carrier: Compensation.

Certified to be a true and correct transcript of the minutes taken at this hearing.

3-4-49.

Frances E. Brindler, Hearing Stenographer.

BEFORE WORKMEN'S COMPENSATION BOARD

MINUTES—January 19, 1949

Workmen's Compensation Board

State of New York

Buffalo, January 18, 1949

Case No. 84414831

THOMAS J. A'HERN, Claimant

SOUTH BUFFALO RAILWAY, Employer

SELF-INSURED, Carrier

Hearing before the Workmen's Compensation Board.

Present: Bart Oddo, Referee, R. Miller, Hearing Stenographer

[fol. 124] APPEARANCES:

Solon Stone representing Employer.

Matthew Weimar representing the Claimant (Widow).

WITNESSES:

None.

Referee: Thomas A'Hern:

Carrier: The employer is going to controvert this death claim on the ground that the Board has no jurisdiction in the matter.

Referee: No; I believe that once having taken jurisdiction in the matter, we continue jurisdiction.

Carrier: We are controverting both disability and death claim on grounds of lack of jurisdiction; shall we put in proof on it.

Referee: So far as the claim for disability is concerned, that is *res adjudicata*. Is that the only issue in this case; jurisdiction.

Carrier: Yes, it is.

Referee: In so far as causal relation, you accept it; you stipulate that.

Carrier: It has been decided that the disability——

Referee: Disability, yes; but that doesn't prove the death was causally related.

Widow: What does that mean.

Referee: You don't have to worry; I'm here to protect you.

Carrier: Well, I think that before I stipulate causal relation on the death claim, that I should investigate that angle further. I think that there is no jurisdiction here, however.

[fol. 125] Referee: Well, we'll resolve the issue relative to jurisdiction, when it is finally presented for my consideration, but before deciding the issue of jurisdiction, I would like to know whether there is going to be any controversy relative to causal relationship.

Carrier: Your husband died of a heart attack, did he.

Widow: That's right.

Carrier: Who was the attending physician.

Widow: Dr. Eheninger in Ebenezer, he is the county——

Carrier: Was he also your attending——

Widow: Dr. Flemming was, from the time he was hurt until he died.

Carrier: Did he attend your husband in his last illness.

Widow: Yes; he has been going to him every two weeks right along.

Carrier: Has he filed a report in the death case.

Widow: I have a death certificate signed by Dr. Ehenger.

Carrier: Did Dr. Flemming——

Widow: Couldn't get Dr. Flemming.

Carrier: Was there an autopsy.

Widow: No.

Referee: There is no death claim before me now anyway.
Carrier: I had an idea there was a death action.
Referee: When did the claimant die.
Widow: Third of January.
[fol. 126] Referee: Award claimant compensation 12-4-47 to—when was last payment.
Carrier: Two weeks before he died.
Widow: That's right; check came and he didn't get it.
Referee: Got one check coming. Two weeks before he died—the third is——
Carrier: 19th or 20th.
Referee: Third was on a Monday, wasn't it.
Widow: That's right.
Referee: 27th, the 20th. From 12-4-47 to 12-20-48 at $25.00 was it.
Carrier: Yes.
Referee: And from 12-20-48 to 1-3-49 at the same rate.
Carrier: Getting $28.00 a week.
Referee: Twenty-eight.
Carrier: Four dollars a day; he was getting twenty-eight.
Referee: You were getting $56.00 every two weeks.
Widow: That's right.
Referee: Make that at $28.00; latter part to be paid to widow. Refer to examiner to prepare death folder, death claim folder. Folder for death claim has not been prepared yet. You'll get a notice on that and then the entire issue will be determined whether you're entitled to compensation or not. In the meantime, you have children.
Widow: Two.
Referee: You get birth certificates of the children; your birth certificate, if possible, your marriage certificate.
Widow: Yes.
[fol. 127] Referee: Have them ready to present them here.
Widow: Yes.
Carrier: You want to close the disability——
Referee: This case closed. That's all.

(Off record discussion.)

Referee: I'll have this case continued for preparation of death claim.

Carrier: All right.

(Claimant's Attorney arrived late.)

Referee: Weimar, I postponed that A'Hern case; no death claim filed.

Claimant's Atty.: I assume your Department will send a notice out.

Referee: We'll do that.

Claimant's Atty.: All right, thank you.

Referee: They raised the issue of jurisdiction—jurisdiction.

Claimant's Atty.: Whether you have jurisdiction. All right then; thank you.

"Certified true and correct."

Transcript completed 3-3-49.

Richard J. Miller, Hearing Stenographer.

[fol. 128] BEFORE WORKMEN'S COMPENSATION BOARD

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of Erie, ss:

Solon J. Stone, being duly sworn, deposes and says that he is an attorney at law and a member of the firm of Kenefick, Cooke, Mitchell, Bass & Letchworth, the attorneys for appellant South Buffalo Railway Company herein; that no opinion was rendered by the Workmen's Compensation Board in making the award in this case except as set forth in annexed record.

Solon J. Stone.

Subscribed and sworn to before me this 15th day of February, 1950. Geo. H. Hooker, Notary Public in the State of New York. Residing in Erie Co. at time of appointment. Erie Co. Clk's No. 940. My Commission Expires March 30, 1950.

[fols. 129-132] Certification of Record by Asst. Secretary (omitted in printing).

[fol. 133] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SIRS:

Please take notice that South Buffalo Railway Company, the Employer and Self Insurer herein, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of its Clerk [fol. 134] on November 27, 1950, unanimously affirming, with costs, the final award of disability compensation by the Workmen's Compensation Board, and from the order of said Board entered December 28, 1950, upon said order of affirmance, and this appeal is taken from the whole and from each and every part of said orders.

January 23, 1951.

Cravath, Swaine & Moore, Attorneys for South Buffalo Railway Company, Employer and Self Insurer-Appellant, No. 15 Broad Street, New York 5, New York.

To:

Nathaniel Goldstein, Esq., Attorney General, State of New York, Attorney for Workmen's Compensation Board, Respondent, The Capitol, Albany, New York,

Matthew Weimar, Esq., Attorney for Claimant-Respondent, 1044 Ellicott Square Building, Buffalo, New York:

Clerk of the Supreme Court, Appellate Division, Third Department, Albany, New York.

Workmen's Compensation Board, Albany, New York.

[fol. 135] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER OF AFFIRMANCE OF APPELLATE DIVISION, THIRD DEPARTMENT, APPEALED FROM—Entered November 27, 1950

The appeal herein having been duly brought before this Court during the above stated Term, and having been argued or submitted for the appellants by Edward L. [fol. 136] Robinson, of Counsel, for the respondent, Workmen's Compensation Board, by Daniel Polansky, Assistant Attorney General, of Counsel, and the Court after due deliberation having handed down its decision thereon on the 15th day of November, 1950:

Now, on motion of Nathaniel L. Goldstein, Attorney General, attorney for the Workmen's Compensation Board, it is

Ordered, that the award of the Workmen's Compensation Board so appealed from be and the same is hereby unanimously affirmed with $90.75 costs to be paid by the appellants to the Workmen's Compensation Board.

John S. Herrick, Clerk. (Seal.)

A copy. John S. Herrick, Clerk.
Ent. 11-27-50.

[fol. 137] BEFORE THE WORKMEN'S COMPENSATION BOARD OF THE STATE OF NEW YORK

[Title omitted]

ORDER OF WORKMEN'S COMPENSATION BOARD ON REMITTITUR FROM APPELLATE DIVISION, THIRD DEPARTMENT, APPEALED FROM.

The above named South Buffalo Railway Company, self-insured employer, having appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from the award and decision of the Workmen's Compensation Board of the State of New York, relative to which

findings of fact and rulings of law were executed by the said Board on or about the 21st day of December, 1949, whereby compensation was awarded the claimant-respondent;

And the appeal having been duly heard by the said Appellate Division, and the court having at a term thereof [fol. 138] commencing on the 13th day of November, 1950, rendered a decision and order on said appeal, and the order having been entered in the office of the Clerk of the said court on the 27th day of November, 1950;

And the papers on appeal together with a certified copy of the order having been duly filed, wherein the said award and decision of the Workmen's Compensation Board of the State of New York was unanimously affirmed by the Appellate Division in the following terms:

> "Ordered, that the award of the Workmen's Compensation Board so appealed from be and the same is hereby unanimously affirmed with $90.75 costs to be paid by the appellants to the Workmen's Compensation Board."

It is ordered that the order of the Appellate Division in the above entitled matter be and the same hereby is made the order of the Workmen's Compensation Board of the State of New York;

And it is further ordered that interest shall be paid from the date of the award.

Dated: New York, Dec. 28, 1950.

Haskell P. Schwartz, Secretary.

[fol. 139] IN SUPREME COURT OF NEW YORK

MEMORANDUM DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT—Decision handed down Nov. 15, 1950

In the Matter of

THE CLAIM OF THOMAS J. AHERN AND GERTRUDE SLOAN AHERN, Respondents,

v.

SOUTH BUFFALO RAILWAY COMPANY, Appellant.

WORKMEN'S COMPENSATION BOARD, Respondent.

This is an appeal by a self-insured employer from a decision of the Workmen's Compensation Board which denied the employer's application for a review and a rehearing of a referee's decision and award allowing disability compensation to the widow of Thomas J. Ahern, the deceased employee. It is conceded that decedent was employed as a switchman by the appellant at Lackawanna, New York. On July 1, 1944, while engaged in the regular course of his employment and while attempting to throw a switch, the switch stuck and the employee was compelled to use extra exertion, strain and effort, by reason of which he suffered an acute coronary occlusion, with resultant disability. He filed a claim for compensation benefits on [fol. 140] January 15, 1945. The employer controverted the claim solely on the issues of accident and causal relation. On September 24, 1945, an award was made in favor of decedent on these issues and the Board on November 15, 1945, affirmed the referee's decision and denied the application for review. No appeal was taken by the employer from these decisions and the awards. The appellant paid compensation without any objection until December 20, 1948. On January 3, 1949, the employee died, as a result of a heart condition. On January 18, 1949, a hearing was held before the referee. The question then arose as to the widow's right to an award for disability compensa-

tion at the time of her husband's death. At this hearing the appellant, for the first time, objected to the disability claim on the ground of jurisdiction. The referee made an award for disability compensation due to the decedent between February 4, 1947, and January 3, 1949, the date of his death. That award is the subject of this appeal. The Board found that the appellant had waived its right to raise the issues of jurisdiction and interstate commerce by reason of gross laches and conduct prejudicial to the decedent's widow. We think appellant had waived its right to question the jurisdiction of the Workmen's Compensation Board in this case. *Matter of Haglund v. Morse Dry Dock & Repair Co.*, 255 App. Div. 895.

Award unanimously affirmed with costs to the Workmen's Compensation Board.

Present—Foster, P.J., Hefferman, Brewster, Deyo and Bergan, JJ.

[fol. 141] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION IN COURT OF APPEALS—July 16, 1951

Pursuant to Section 170 of the Civil Practice Act, it is hereby

Stipulated, that the papers as hereinbefore printed, consist of true and correct copies of (1) the record upon which the Appellate Division, Third Department, acted in making the order appealed from, (2) notice of appeal to the Court of Appeals dated January 23, 1951, (3) the order of affirmance of said Appellate Division which was entered in the office of its Clerk on November 27, 1950, (4) the order of the Workmen's Compensation Board entered on December 28, 1950, on remittitur from said Appellate Division, and (5) memorandum decision of said Appellate Division, dated November 15, 1950, and the whole thereof, now on file in said Appellate Division and in the Workmen's Compensation Board.

Certification thereof, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

July 16, 1951.

Cravath, Swaine & Moore, Attorneys for Employer and Self-Insurer-Appellant; Nathaniel L. Goldstein, Attorney General, State of New York, Attorney for Workmen's Compensation Board, Respondent; Matthew Weimar, Attorney for Claimant-Respondent.

[fol. 142] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall in the City of Albany, on the 13th day of March in the year of our Lord one thousand nine hundred and fifty-two, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Justice, Presiding. Raymond J. Cannon, Clerk.

Remittitur—March 14, 1952

In the Matter of the Claim for Compensation etc. made by Gertrude Sloan Ahern, Widow, Claimant,

agt.

South Buffalo Railway Company, Employer and Self Insurer, Appellant,

Workmen's Compensation Board, Respondent

Be it remembered, That on the 20th day July in the year of our Lord one thousand nine hundred and fifty-one, South Buffalo Railway Company, Employer and Self Insurer, the appellant—in this cause, came here unto the Court of Appeals, by Cravath, Swaine & Moore, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Workmen's Compensation Board, the Respond-

ent—in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 143] Whereon, The said Court of Appeals having heard this cause argued by Mr. Albert R. Connelly, of counsel for the appellant—, and by Mr. Daniel Polansky, of counsel for the respondent Board, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same is hereby affirmed with costs.

And it was also further ordered, that the record aforesaid and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made, and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, etc.

(S.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, March 14, 1952.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 144] In Court of Appeals of New York

Opinion of the Court of Appeals of the State of New York (303 N. Y. 545)

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1950, which

unanimously affirmed a decision and award of the Workmen's Compensation Board made under the Workmen's Compensation Law denying an application by the above-named appellant employer, South Buffalo Railway Company, for a review or rehearing of an award entered upon a decision of a referee granting disability benefits to claimant, as the widow of Thomas J. Ahern, an employee of the appellant employer, up to the date of death of said employee.

Conway, J. This is an appeal by the self-insured employer from an order of the Appellate Division of the Supreme Court, Third Department, entered November 27, 1950, unanimously affirming a decision made by the Workmen's Compensation Board, pursuant to the provisions of the Workmen's Compensation Law, which denied the employer's application for a review or rehearing of a referee's decision allowing disability compensation to the widow of Thomas J. Ahern, the deceased employee, for a period up to and including the date of the employee's death. The case was continued for the preparation of a death claim by the widow of the decedent.

A motion for permission to appeal to this court was denied upon the ground that an appeal therefrom to this court lies as of right. (302 N.Y. 877.)

In January, 1945, Thomas J. Ahern, the decedent, who had been employed as a switchman by the South Buffalo [fol. 145] Railway Company (hereinafter called the Railway Company) at Lackawanna, New York, where the employer had its principal place of business, filed a claim for disability compensation with the board. The claim was based upon a coronary occlusion which the decedent suffered on July 1, 1944. It was the decedent's claim that he was engaged in the regular course of his employment while attempting to throw a switch which had become stuck, and was compelled to use extra exertion which brought about the occlusion, with resultant disability. In its notice to the board dated February 1, 1945, the Railway Company controverted the claim on the grounds of accident and causal relation, expressly reserving the right to controvert the claim for such other reasons as might later appear. Several hearings were held between March and July, 1945.

An award of compensation was rendered in favor of

the decedent in September, 1945, for disability compensation in respect of temporary total disability from July 1, 1944, to June 5, 1945. The case was continued for consideration of the extent and length of disability subsequent to June 5, 1945.

The employer paid this initial award in the sum of $1,353.33.

A second award was made in favor of the decedent on January 10, 1946, for the period from June 5, 1945, to January 8, 1946.

A third award was rendered on February 5, 1947, for the period from January 8, 1946, to February 4, 1947, and payments were directed to be continued by the employer.

The employer paid all of the awards and continued to [fol. 146] pay compensation to December 20, 1948, in accordance with the order of the board.

The total amount of compensation paid by the employer to the decedent, for the four and one-half-year period amounted to the sum of $5,528.66.

On January 3, 1949, the decedent died as a result of his heart condition. On January 18, 1949, a hearing was held before the referee at which the decedent's widow was requested to file a death claim. At that hearing, the question of the widow's right to an award for disability compensation for the unpaid two-week period up to the time of decedent's death arose. It was at that hearing that the employer, for the first time, challenged the jurisdiction of the board and thus sought to controvert the disability claim. The employer sought to raise the same objection to any claim for death benefits. The referee then rendered the award now on appeal for disability compensation for the final two-week period preceding death, to which reference has been made.

Thereafter in February, 1949, the Railway Company filed with the board an application for review or rehearing of the decision and award of the referee on the ground that at the time of the accident the decedent was employed by the Railway Company in interstate commerce; that under these circumstances the case came within the provisions of the Federal Employers' Liability Act; and that, therefore, the board was without jurisdiction of the claim. The board denied that application.

On appeal the Appellate Division confirmed the board's determination.

On the oral argument before us counsel for the Railway [fol. 147] Company stated that it is not seeking to recover the payments covering disability from July 1, 1944 (the date of the accident) until December 20, 1948 (the date of the last payment made), but that it is attacking the award of two weeks compensation ($56) made to the decedent's widow for the period from December 20, 1948, until the decedent's death. The Railway Company contends that the determinations of the board and the Appellate Division were improper and should be reversed and that the proceeding should be remanded to the board for submission of proof as to jurisdiction of the board over the subject matter of the proceeding.

It is well established that Congress, by enacting the Federal Employers' Liability Act, has pre-empted the entire field of liability in respect of personal injuries to railroad employees whose duties "further" or "directly" or "closely * * * affect" interstate commerce, and that no room exists for State regulation or action in that field. (Federal Employers' Liability Act, § 1; U. S. Code, tit. 45, § 51; *Matter of Baird* v. *New York Central R. R. Co.*, 299 N.Y. 213, 215-216; *New York Central R. R. Co.* v. *Winfield*, 244 U.S. 147, 152, 153; *Matter of Wright* v. *New York Central R. R. Co.*, 288 N.Y. 719; *Erie R. R. Co.* v. *Winfield*, 244 U.S. 170, 172.) This is true even as to injuries occurring without fault, as to which the Federal Employers' Liability Act provides no remedy. (*New York Central R. R. Co.* v. *Winfield, supra.*)

In *Matter of Newham* v. *Chile Exploration Co.* (232 N.Y. 37, 42), and *Matter of Doey* v. *Howland Co.* (224 N.Y. 30), we have had occasion to consider the question of waiver of lack of jurisdiction of the board.

In the *Newham* case (*supra*) we held that the fact that [fol. 148] an employer had agreed to bring before the appellate courts of this State solely the question of the claimant's employment did not operate as a waiver of his right to question the jurisdiction of the board thereafter; and in the *Doey* case (*supra*) we held that an employer, who had recognized the validity of a board award and made payments thereon, was not precluded from moving to vacate

the award on the ground of lack of jurisdiction, where subseqvent to the payments under such award the United States Supreme Court determined that the New York State Workmen's Compensation Law was void insofar as it applied to persons engaged in maritime work, such as the employee. In this latter case we concluded that since the board lacked jurisdiction to render the award, any award in fact made by the board was a nullity and would be so treated at any time the parties saw fit to question it by either a direct or collateral attack.

The foregoing cases establish unequivocally that the State is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce. There is another avenue of approach to the problem which bears exploration, however.

The Federal Employers' Liability Act (Act, § 5; U. S. Code, tit. 45, § 55), makes void any "contract, rule, regulation, or device whatsoever" to exempt a carrier from liability. Notwithstanding that provision, the right of the employee to dispose of a claim he may have against his employer by entering into a compromise of his dispute is a right of contract which Congress did not intend to impugn. The employee may adjust "his own affairs in his own way after a cause of action has arisen in his favor, so long as such adjustment is fair and violates neither public policy [fol. 149] nor some proper and enforceable statutory provision." (*Anderson* v. *Oregon Short Line R. Co.*, 47 Utah 614, 620.) That section forbids only contracts before injury exempting the master from liability and has no application to a contract of settlement. (*Ballenger* v. *Southern Ry. Co.*, 106 S.C. 200, 203). Thus, the Supreme Court of the United States has held that that provision does not operate to prevent an otherwise valid release of a claim by an individual engaged in interstate commerce since "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." (*Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, 631.) In the more recent case of *Boyd* v. *Grand Trunk W. R. Co.* (338 U.S. 263, 266), an agreement which sought to limit the venue of an action that might thereafter be brought by an employee under the Federal Employers' Liability

Act was held invalid as contravening the act, but the court reaffirmed the ruling in the *Callen* case characterizing the agreement therein as a "full compromise enabling the parties to settle their dispute without litigation, which * * * did not contravene the Act".

Prior to the decision in the Callen case (*supra*) we held in *Brassel* v. *Electric Welding Co.* (239 N.Y. 78), that where an employee engaged in maritime work had accepted a final award of the New York State Workmen's Compensation Board, his cause of action for damages growing out of the same injuries, though based upon maritime law, was extinguished. At page 80 we declared: "We think the acceptance of the payment has destroyed the right of action. The question is not whether the award has the effect of a binding adjudication. We may assume that it is void, [fol. 150] and that, at least while unpaid, it might have been set aside or disregarded (*Matter of Doey* v. *Howland Co., Inc.*, 224 N.Y. 30). The question is whether a right of action has survived the collection of the award and the retention of the proceeds."

On the other hand, in *Larsey v. Hogan & Sons, Inc.* (239 N. Y. 298, 301-302), where an employee entered into an agreement with his employer, the employee to receive and the employer to pay, a sum which might be awarded the employee as compensation for injuries received in an accident while engaged in maritime work, and thereafter received part payment although no award had been made by the board, but refused to receive the balance and commenced an action to recover damages for negligence, we held that "The agreement may have amounted to an accord but payment only would amount to a satisfaction. Until there were an accord and satisfaction of plaintiff's claim by full and complete payment, the plaintiff was not barred from maintaining his action for negligence." Of course, the cause of action for damages was held to be subject to a setoff to the extent of partial payment.

The *Brassel* and *Larsey* cases (*supra*), although decided in 1924 and 1925, represent the state of the law as it existed prior to 1922 when the injuries in those cases took place. At that time section 114 of the New York Workmen's Compensation Law declared that the act applied to persons engaged in intrastate commerce and interstate or foreign commerce

only to the extent that their mutual connection with intrastate work was clearly separable from interstate or foreign commerce. In 1922 (L. 1922, ch. 615), section 114 of the [fol. 151] Compensation Law was renumbered section 113 and the following addition was made by the Legislature: "awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

In 1926, in *Fitzgerald v. Harbor Lighterage Co.* (244 N. Y. 132, Cardozo, J.), we considered, for the first time, the statutory addition to section 113. It is interesting to note that we have not had occasion to consider that addition since the *Fitzgerald* case. There the plaintiff was injured on a vessel while working as a stevedore in navigable waters. He filed a claim for compensation for the resultant disability. The employer submitted to the jurisdiction of the board. Two awards were made and paid and the case was placed "on the final adjustment calendar". Thereafter the plaintiff commenced a suit for damages. We discussed the *Brassel* and *Larscy* cases (*supra*) and made the following observation (pp. 135, 136): "The decision in *Larscy v. Hogan & Sons, Inc.*, is decisive of the case at bar, unless an amendment of the statute, which took effect June 1, 1922 [the addition to § 113], after Larsey had been injured, has changed the previously existing rule. * * * *We find it unnecessary to determine whether waiver in accordance with this section would supersede the remedy in admiralty.* Construing our own statute, we hold that the waiver which it contemplates has never been announced." (Emphasis [fol. 152] supplied.) In construing the amendment to section 113 we wrote at page 137: "In the setting of the context, it imports a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another. Until that intention is announced by all who must participate, a waiver by any one of them is inchoate and revocable."

Here, it is clear, that we must construe the addition to section 113, in the words of Judge Cardozo, "In the setting

of the context," and it is equally clear that there is present in the facts already detailed "a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another", and that such intention has been announced by all who must participate in such an agreement.

In the Report of the Joint Legislative Committee (N. Y. Legis. Doc., 1922, No. 55) which recommended the enactment of the above-quoted addition to the New York Workmen's Compensation Law, the following statement appears (p. 12):

"The proposed amendment will permit those who choose to elect to accept the provisions of our law to so elect, and the one to pay [and] the other to accept compensation thereunder."

In the light of the wording of the addition to section 113 providing for waiver and the statement of legislative intent above quoted, it cannot be urged that the statute was intended simply to codify the rule that only a final award of the board, made and paid, precludes an individual from asserting his Federal rights. If that were so, section 113 would be meaningless. It provides that if the parties waive their Federal rights and remedies the board may act. If [fol. 153] the payment of a final award be deemed the waiver, then there is nothing further for the board to do, and no reason for it to act. Obviously then, section 113 means to do more than codify the rule which is laid down in the early cases. To our mind, the language of the section and that of the legislative committee which recommended its enactment plainly indicates that is a *permissive* statute intended to empower the board to make awards of compensation if all of the parties elect to settle their dispute in that fashion, and forego their Federal rights and remedies. It is not to be imposed upon them in the absence of a joint waiver or agreement evidencing an intention to be bound by its terms. In thus construing that section, we have been guided by the familiar principle of our jurisprudence that the courts are reluctant, and it is only as a last resort, that they will strike down a solemn legislative enactment on the ground that it is unconstitutional. We believe that the interpretation above given to section 113 of our Workmen's Compensation Law, is clearly the proper interpretation, and

that as so construed section 113 does not conflict with the fundamental law of the land.

There is nothing contained in the Constitution of the United States which prohibits, nor has the United States Supreme Court held, that, after an accident, all interested parties may not dispose of their controversy as they themselves see fit, provided that the means whereby such dispute is settled or adjusted does not violate public policy. If all of the parties agree that the employer and carrier will pay and the employee will accept compensation, in the amounts and manner provided by the workmen's compensation [fol. 154] statute of a State, rather than resort to litigation and the State has permitted its compensation board to make awards under such circumstances, we can conceive of no valid objection to such an arrangement. If the parties agree on a sum of money to be paid in discharge of the claim for personal injuries, such agreement, if there has been no overreaching or fraud, does not violate any constitutional provision, Federal legislation or announced public policy. Neither is there any sound reason why the parties may not designate an impartial third person or group of persons to determine the amount to be paid in extinguishment of the claim. To our mind that is all that section 113 of the Workmen's Compensation Law purports to accomplish.

Clearly the State of New York cannot circumvent by statute the ruling that Congress has pre-empted the entire field of liability in respect of personal injuries to persons engaged in interstate commerce and no room exists for State regulation in that field. (*New York Central R. R. Co. v. Winfield*, 244 U. S. 147, *supra*.) Thus if the Legislature were to declare arbitrarily that certain conduct constitutes a waiver or agreement to forego Federal rights and remedies where, as a matter of fact such conduct does not evidence a compromise agreement, the statute would be violative of the Federal Constitution. In *Erie R. R. Co. v. Winfield* (244 U. S. 170, *supra*), the United States Supreme Court construed such a statute. In that case the claimant, employed by a railroad engaged in both interstate and intrastate commerce, was struck by an engine and received injuries from which he died. No causal negligence was alleged or proved and both parties assumed there was none. The Trial Judge [fol. 155] held that the employee was not employed in inter-

state commerce at the time of the accident and that compensation should be made to the widow under the State (New Jersey) statute. A judgment in her favor was entered, but reversed by the Supreme Court of the State on the ground that the employee was engaged in interstate commerce at the time of the accident and that the case was controlled by the Federal Employers' Liability Act. That judgment was in turn reversed by the Court of Errors and Appeals on the ground that the Federal act was inapplicable in the absence of causal negligence. The United States Supreme Court declared that three questions were presented for decision: (1) whether the Federal act was regulative of the carrier's liability even where no negligence is shown, (2) whether the facts established that the deceased was engaged in interstate commerce at the time of the accident, and (3) "whether by reason of the state statute the carrier became bound contractually to make compensation in this instance, even though it came within the federal act." (P. 172.)

The court answered the first two questions in the affirmative. In determining the third question the court pointed out that the New Jersey statute in question consisted of two parts. One part dealt with liability founded upon negligence and the other liability in the absence of negligence if the injury to the employee was an incident of the service in which he was employed. The latter part was described as "elective" and not to be applied unless the employer and employee, expressly or impliedly, agreed to be bound thereby and surrender their rights to any other form of compensation.

[fol. 156] With respect to the means by which such agreement was to be manifested the statute provided that every contract of hiring "shall be *presumed* to have been made" with reference to that part of the statute and unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be *presumed*" that the parties "have agreed to be bound" by that part of the statute. (Emphasis supplied.) The court stated at pages 173-174: "There was no *express* agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as

it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary, but such a presumption cannot be indulged here [* * *]" (Emphasis supplied.) The court held that it was beyond the power of a State to interfere with the operation of the Federal Employers' Liability Act "by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory *presumption.*" (Emphasis supplied.)

It will be seen that the court did not declare that it is beyond the power of a State to enact a statute conferring upon the employer, employee and insurance carrier the privilege of compromising their dispute by submitting it to the board. Moreover, the language of the Supreme Court in the *Erie* case (*supra*) above quoted, indicates that the court would have reached a different result had the parties *actually agreed* to forego their Federal rights and remedies.

Section 113 of the New York Workmen's Compensation Law, unlike the New Jersey statute, does not require the [fol. 157] parties to choose between the Federal act and the State Workmen's Compensation Law, nor does it impute such an election to them by means of a presumption as did the New Jersey statute. Section 113 merely offers the parties a means whereby they may compromise their dispute, if they are *mutually desirous* of so doing.

No constitutional provision, Federal statute or Federal court holding has been called to our attention, which prohibits a State Legislature from giving effect to the lawful words and/or acts of the parties. The Legislature of the State of New York has said, through section 113 of the Workmen's Compensation Law, that when the words and/or acts of the parties clearly establish that the parties desire to have the State Compensation Board award compensation rather than be compelled to litigate their differences, the board may award compensation. We do not think that any fault may be found with such a statute.

The United States Court of Appeals for the Second Circuit has recently considered, in the case of *Heagney v. Brooklyn Eastern Dist. Terminal* (190 F. 2d 976, certiorari denied 342 U.S. 920), section 113 of our Compensation Law, and the conclusion of that court that the section is valid and

that the agreement of the parties to abide by the awards of the State board, plus payment of a substantial number of such awards, constitute a release or compromise of the parties' rights under the Federal act, is in agreement with the position that we have outlined above.

In that case the plaintiff, a hostler working atop one of the defendant's locomotives, brought an action in a Federal District Court pursuant to the provisions of the Federal [fol. 158] Employers' Liability Act, to recover damages for injuries sustained when he slipped on some grease and fell to the ground. Two years prior to the commencement of the suit the plaintiff had signed a statement for the employer describing the accident and said: "I have no intention of suing my employer but going to take voluntary compensation." The employer began to pay compensation on February 17, 1947, at the maximum rate allowed by New York law. Thereafter, a clerk of the New York State Workmen's Compensation Board informed the defendant that a hearing was to be held, the purpose of which was "Question of Jurisdiction." At the hearing the defendant's representative declared that it was waiving the question of jurisdiction and paying compensation. The referee then prepared a record entitled "Notice of Decision and Award". Under the section designated "Decision" the record stated: "Accident, notice, causal relation established. Case continued." Several hearings were held thereafter and compensation payments were continued. On January 6, 1949, almost two years after the accident, the plaintiff notified the defendant that he was "making claim under the federal law and had the case closed 'without prejudice' before the Board" (p. 977). The employer asserted its willingness to make further compensation payments in accordance with the order of the State board. As a defense to the claim for damages the employer pleaded waiver under Section 113 of the New York Compensation Law. The employer then moved for summary judgment dismissing plaintiff's action on the ground that he had waived Federal remedies by the acceptance of awards of the board. The United States District Court for the Eastern District of New York granted the motion and [fol. 159] dismissed the complaint. The United States Court of Appeal for the Second Circuit affirmed, holding that the employee had waived, under the provisions of sec-

tion 113 of the New York Workmen's Compensation Law, his Federal rights and remedies, and that section 113 was valid and binding upon the employee.

It is to be noted that in that case the employee expressly declared that he had no intention of suing his employer but wished to receive voluntary compensation. The employer, in turn, expressly declared that it was waiving the "Question of Jurisdiction." The parties submitted to the jurisdiction of the board and pursuant to the direction of that board the employer tendered and the employee accepted a number of interlocutory awards.

It was the employee's contention that "waiver is insufficient; there must be an 'accord and satisfaction,' meaning thereby a 'final award' by the Board duly paid and accepted." (P. 978.)

The United States Court of Appeals concluded, to use the words of Judge Frank who dissented, that "His [plaintiff's] agreement, plus payment by defendant of a substantial portion of those partial awards, constituted a release or 'full compromise' of whatever he might otherwise have recovered by suit under the federal statutes, and thus constituted a complete defense to plaintiff's present suit." (P. 980.)

Several of the statements of the majority of the court bear repetition here. At page 979 it was said: "When counsel came into the case and conducted its prosecution over many months, with obvious success signalized by increased or additional awards, only to raise this issue at a [fol. 160] late date when the end of state compensation was apparently approaching, there should no longer be any possible doubt as to the waiver." The court continued: "Hence there was no genuine issue as to the fact of waiver, and the only question which remains is as to its validity."

The court then considered the employee's claim that "waiver is insufficient", and that "there must be an 'accord and satisfaction' ". In discussing that question the court recognized the general rule that a claim is not discharged until the accord executory or agreement is satisfied or performed but pointed out that the phrase "executory accord" is a confusing one, and that the test to be applied in determining whether the parties have given up their Federal rights is as follows: "What we must look for, therefore, is

a fair compromise whereby the parties settle their dispute in substitution for the litgation permitted by the Federal Acts; there is no mystic significance to be accorded a 'satisfaction' upon some assumed 'final award.' When a state procedure accomplishes just that by agreement of all concerned, it should therefore be at least as valid as a formal release secured on payment of a few hundred dollars. And certainly no invidious distinction should be made so that only a purely temporary injury can be settled in this way, and that any permanent injury is excluded from settlement just because the state process requires continuing payments for the good of the injured employee." (P. 979.)

In *the Heagney* case (*supra*), the employee—the one seeking to escape from his declared intention and to question jurisdiction of the board—made his agreement in words. In the case now before us the employer which made [fol. 161] its agreement by conduct rather than declared intention, must be held to be equally bound since in the law there is no distinction between agreements made by words and those made by conduct. There was an equal disclosure of intention to settle the dispute through the board "in substitution for the litigation permitted by the Federal Acts". It is elementary that there can be no agreement unless all of the parties involved intended to enter into one. Moreover, it is well-established contract law that in determining whether the parties possessed the necessary intention to contract, an objective test is generally to be applied. That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling. Thus, in *Hotchkiss v. National City Bank of New York* (200 F. 287, 293, L. Hand, J., affd. 201 F. 664, affd. *sub nom. National City Bank v. Hotchkiss*, 231 U. S. 50), it was said: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." (See, also, *Amend v.*

Hurley, 293 N. Y. 587, 596; *Porter v. Commercial Cas. Ins. Co.*, 292 N. Y. 176, 183-184.) An agreement by conduct does not differ from an express agreement, except in the manner by which its existence is established.

In the case now before us it is clear that there was no [fol. 162] agreement between the parties when the initial hearings were held. At that time the employer had not agreed with the employee as to the amount the deceased was to receive, nor did it agree to have the board determine the sum to be paid. At the initial hearings held between March 6, 1945, and July 3, 1946, the employer indicated its unwillingness to have the board act by controverting the claim on the issues of accident and causal relation. Furthermore, we do not think that it may be said that the employee was then disposed to declare that, in filing a claim, he was prepared to abide by the ruling of the board, so as to be foreclosed from claiming his Federal rights should the board deny him compensation. However, it is clear that the conduct of the parties subsequent to the board's ruling on the questions of accident and casual relation and its decree that compensation be paid, establishes, as conclusively as the evidence in the *Heagney* case (*supra*), that it was the mutual desire of the parties that the board, acting as an impartial third person, should determine the amount to be paid in discharge of the claim by the deceased.

On the oral argument counsel for the employer asserted that its conduct in denying accident and causal relation on the initial hearings establishes that the payments of compensation made by the employer thereafter were involuntary payments, and that its acquiescence or submission to the determinations of the board should not be construed as a joint waiver or accord and satisfaction.

The employer, in thus arguing, overlooks the fact that its other conduct belies its protestations of lack of intent and does evince the intention to enter into a compromise [fol. 163] whereby the dispute in question might be settled without litigation: *First*: No appeal was ever taken by the employer from any of the awards made except that herein which has to do with the award covering the last two weeks of the decedent's life, and *second*: From the outset the employer was represented by counsel and is chargeable with

the knowledge that the board was powerless to require it to pay compensation unless it waived its Federal rights and remedies. The records in our court commencing with *Ives v. South Buffalo Ry. Co.* (201 N. Y. 271), and continuing through *Herke v. South Buffalo Ry. Co.* (227 N. Y. 618) and *Keogh v. South Buffalo Ry. Co.* (233 N. Y. 31) indicate clearly that the various counsel for the Railway Company, and thus the Railway Company, over the last forty years have been cognizant of the nature of its liability to its employees, and the remedies of the latter both under the Compensation Law and the Federal Employers' Liability Act. Nevertheless, the employer made payments for four and one-half years in accordance with the directions of the board, *choosing not to assert that the board lacked jurisdiction.* The payments of awards by and silence of the employer is significant in this case. An individual's silence may not be construed as the acceptance of an offer unless there is a duty to speak imposed on that person. However, we think that such a duty rested on the employer here. The Federal Employers' Liability Act (Act, § 6; U. S. Code, tit. 45, § 56) provides that no action may be maintained under its terms "unless commenced within three years from the day the cause of action accrued." The employer herein was aware that the employee desired to have the board determine the payments to be made in discharge of [fol. 164] his claim rather than resort to litigation, and with this knowledge it continued to make payments beyond the time when the Statute of Limitations had run on the plaintiff's claim for negligence under the Federal act—indeed, it has run as to the death claim, too. The employer cannot validly urge that it should be permitted to make payments beyond the period of the Statute of Limitations, thus leading the employee to believe that it was equally agreeable to the employer that the board act, without having its silence construed as an acceptance of the employee's offer to compromise the claim by having the amount of the claim fixed by the board. It may not be said that the employer would be estopped from asserting the Statute of Limitations on the ground that, by its conduct, it had misled the decedent and his widow to their detriment. The Federal and State courts have said that the Statute of Limi-

tations in the Federal Employers' Liability Act is a limitation on the right and that if the action is not commenced in time, the right, not merely the remedy, is lost. (See, e. g., *American R. Co. of Porto Rico v. Coronas*, 230 F. 545, 546; *Taylor v. Southern Ry. Co.*, 6 F. Supp. 259, 260; *Bement v. Grand Rapids & Ind. Ry. Co.*, 194 Mich. 64, 66-68; *Gauthier v. Atchison T. & S. F. Ry. Co.*, 176 Wis. 245, 247-249.)

The employee's intention to thus settle the dispute is equally clear. The employee filed his claim for workmen's compensation six months after the accident. At the first hearing, held less than two months thereafter, he was represented by counsel. We must assume that at that time he was fully aware of any Federal rights that he might possess. Furthermore, he was bound to know, whether in fact he did know, that the New York Workmen's Compen-
[fol. 165] sation Board was powerless to award him compensation unless he waived his Federal rights and remedies. With this knowledge he was content to submit his claim to that board. At no time did the deceased indicate a desire to enforce his Federal rights. In the *Heagney* case (*supra*) it was said at page 978: "If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer."

That language is equally applicable here. When the acts of the decedent and the employer are viewed in the light of what reasonably intelligent persons would naturally have intended by them, we think the inference, fairly to be drawn, is that both the employer and employee intended that the board's determinations be taken "in substitution of the litigation permitted by the Federal Acts". That being true, we can conceive of no sound reason why the employer should be permitted to urge his Federal rights at this late date.

The *Fitzgerald* case (*supra*) is not to the contrary. It is essential to note that in that case (1) the employee asserted his lack of intention of waiving his Federal rights, (2) the employer in its answer declared that in making payments

it had acted under mistake of fact and law and asked for repayment, and (3) there was no evidence that the carrier [fol. 166] supplied the moneys with which the provisional awards were paid. Certainly those being the facts it could not be held that all of the parties had waived or agreed to forego their Federal rights and remedies. Here (1) the employee has indicated his willingness to forego his Federal rights and remedies, (2) the employer has not asked for repayment of the awards on the ground that it acted under mistake of fact and law in paying them and there is no question about the agreement of an insurance carrier since the employer is self-insured.

The *Newham* and *Doey* cases (*supra*) decided prior to the enactment of the addition to section 113, which held that the lack of jurisdiction in the board had not been waived, are distinguishable. In neither of those cases could it be said that the facts established that the parties with full knowledge of their Federal rights jointly waived or agreed to relinquish them and resort to compensation as a substitute for litigation and since then the statute has been amended.

The order of the Appellate Division should be affirmed, with costs.

[fol. 167] Fuld, *J.* (dissenting). The self-insured employer herein, South Buffalo Railway Company, contests the jurisdiction of the Workmen's Compensation Board to make an award of compensation for the benefit of the injured employee, on the ground that at the time of the accident the employee was a railroad worker engaged in duties directly affecting interstate commerce, and that the exclusive remedy for any injuries sustained by him was an action under the Federal Employers' Liability Act (Act, §1; U. S. Code, tit. 45, §51). The employer was denied an opportunity before the Board to present evidence in support of its jurisdictional objection, and the issue on this appeal is the validity of that objection on the facts asserted by the employer.

If the Railway Company had challenged the jurisdiction of the Board prior to the making of any award, that challenge, it is indisputable, would have been sustained, since, on the facts posited, the Federal Employers' Liability Act provides the exclusive remedy. The Board's jurisdiction

in this case is being upheld by this court solely because of the fact that three prior temporary awards of compensation were made by the Board and paid by the employer without any jurisdictional objection being raised and that the employer continued to make payments of compensation—without the compulsion of any award—at the rate previously awarded until shortly before the hearing at which the final award of disability compensation now challenged was made. The employee died about two weeks after the employer ceased making payments.[1]

[fol. 168] On the strength of the employer's acquiescence in and payment of, the three temporary awards, and its continuation of payments subsequent to the third temporary award, the Workmen's Compensation Board made a finding of fact that the employer had "waived" its jurisdictional objection and was further precluded from asserting such objection by reason of laches and estoppel. The Appellate Division similarly relied on the doctrines of waiver, laches and estoppel, in affirming the Board's determination.

It is not entirely clear whether the decision of this court is predicated on the theory of waiver or on the view that the facts establish a binding executory accord between the parties. Whichever be the basis of the decision, I am constrained to dissent.

We all agree that Congress, by enacting the Federal Employers' Liability Act, pre-empted the field of liability for injuries to railroad employees whose duties are in furtherance of, or "directly" or "closely • • • affect" interstate commerce, to the exclusion of regulation by the states. (See *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 152, 153; *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170, 172; *Matter of Baird* v. *New York Central R. R. Co.*, 299 N. Y. 213, 215, 216; *Matter of Wright* v. *New York Central R. R. Co.*, 288 N. Y. 719, certiorari denied 317 U. S. 668). If the duties of the injured employee in this case were in

[1] This appeal does not involve any claim for death benefits, though I note that the employer did announce that it would contest the Board's jurisdiction to entertain such a claim if any were filed by the employee's widow. And I also note that the employer does not seek the return of any payments already made.

furtherance of interstate commerce or directly or closely affected it, then obviously the state agency had no jurisdiction of the subject matter of his claim. (See *Matter of Baird* v. *New York Central R. R. Co., supra*, 299 N. Y. 213, 216; *Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37, 42; *Matter of Doey* v. *Howland Co.*, 224 N. Y. 30, 38, certiorari denied 248 U. S. 574.)

[fol. 169] We are all further agreed upon the fundamental principle that a determination made by a tribunal that is without jurisdiction of the subject matter is a nullity, and that the lack of jurisdiction cannot be waived or overcome by the consent or agreement of the parties. (See *Matter of Doey* v. *Howland Co., supra*, 224 N. Y. 30, 39; *Matter of Newham* v. *Chile Exploration Co., supra*, 232 N. Y. 37, 42; cf. *Mitchell* v. *Maurer*, 293 U. S. 237, 244; *United States* v. *Corrick*, 298 U. S. 435, 440.) In such circumstances, this court has held, "it is elementary that no agreement, waiver or stipulation could confer upon the state of New York or its courts or commissions, jurisdiction which it does not and cannot possess." (*Matter of Newham* v. *Chile Exploration Co., supra*, 232 N. Y. 37, 42.)

The court, however, reaches the result it does herein in reliance upon an amendment to section 113 of the Workmen's Compensation Law enacted in 1922, subsequent to the *Doey* and *Newham* decisions (*supra*), authorizing awards to be made by the Workmen's Compensation Board of this state "in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier *waive* their admiralty or interstate commerce rights and remedies." The constitutionality of this statutory provision has, strangely enough, never been passed upon by this court.

In *Fitzgerald* v. *Harbor Lighterage Co.* (244 N. Y. 132), the only case in which we have heretofore had occasion to consider the amended statute, we found it "unnecessary to determine whether waiver in accordance with this section [§ 113] would supersede the remedy in admiralty," since we concluded that the facts did not establish a "waiver" of the kind required by the statute (244 N. Y., p. 136).

Considered purely as a matter of "waiver", I am unable [fol. 170] to see how the mere declaration by the state legislature that the parties may "waive" the state's lack

of jurisdiction of the subject matter, can have any added force, when the acts of the parties, relied upon as constituting the waiver, would, in the absence of the statutory declaration, be entirely ineffectual to confer jurisdiction. If the state is excluded from the particular sphere of action, it follows that the state is powerless by its own fiat to confer jurisdiction on itself or on its tribunals.

The parties may, of course, enter into a valid agreement for a release or a compromise or an accord and satisfaction of the employee's claims under the Federal Employers' Liability Act. The binding effect of such an agreement would ordinarily be determined by our local law of contracts. The state would undoubtedly have power to legislate with respect to the requisites and binding effect of such an agreement, as it has, for example, done in the case of executory accords generally (Personal Property Law, §§33-a, 33-b). It is, however, clear that the facts in this case do not suffice to establish either a release or a compromise or an accord or satisfaction effectual under our common law of contracts or under section 33-a of the Personal Property Law.

The court is apparently interpreting section 113 as giving binding effect, as an executory accord, to an express or even implied agreement by the parties to accept any award that might thereafter be made by the state tribunal in lieu of a determination of the employee's claim in accordance with the federal statute. I cannot subscribe to such a strained reading of the language of that section, which speaks, and unequivocally, only in terms of "waiver", and which, indeed, has already been construed by this court as a statute relating to "waiver". (See *Fitzgerald* v. *Harbor Lighterage Co., supra,* 244 N. Y. 132, 136-137.) Moreover, the effect of such an interpretation is so far-reaching as to permit any express or implied agreement between the parties to submit to the jurisdiction of the Board to serve as a device for circumventing the jurisdictional limitations on the powers of the state and its tribunals.

[fol. 171]

If we put aside section 113, it is plain that under our settled course of decision nothing short of an actual accord and satisfaction, evidenced either by express agreement of the parties or by the payment by the employer or insur-

ance carrier, and the acceptance by the employee, of a *final* award of the Workmen's Compensation Board would operate to extinguish the employee's claims under the federal statute and thereby supplant the federal remedy. See, e. g. *Brassel v. Electric Welding Co.*, 239 N. Y. 78.) Thus, we have squarely held that the "acceptance of an award *not final* is at most an accord, and not a satisfaction, with the result that the cause of action for damages continues unextinguished, though subject to a set off to the extent of partial payments". (*Fitzgerald v. Harbor Lighterage Co., supra*, 244 N. Y. 132, 135; see, also, *Larsey v. Hogan & Sons*, 239 N. Y. 298.)

Whether or not any special significance is to be assigned to section 113 in this regard, *Fitzgerald v. Harbor Lighterage Co.* (*supra*, 244 N. Y. 132) impresses me as decisive of the issue now presented. That case involved a stevedore who, injured while working on a vessel in navigable waters, filed a claim for disability compensation with the state compensation tribunal. Two awards were made and paid, covering a period of almost a year, and the case was then placed on the "final adjustment calendar". Before a final award was made, the employee commenced a suit for damages under the federal act. The court, in an opinion written by [fol. 172] Judge Cardozo, held that, since no final award had been made, the acceptance of the temporary awards constituted "at most an accord, and not a satisfaction," with the result that the employee's claim under the federal act was not extinguished as a matter of contract law, and that there was likewise no sufficient basis for a finding of a waiver within section 113, even if that section were valid.

Section 33-a of the Personal Property Law, enacted in 1937 (L. 1937, ch. 77), subsequent to the *Fitzgerald* decision (*supra*), gives effect to an executory accord "to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property," "*provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent.*" (Emphasis supplied.) Broad as its provisions are, however, that section

is plainly not applicable in the present case, since there is no promise in writing signed by either of the parties involved, or by an agent, agreeing that payment of any award to be made by the Board shall be in satisfaction or discharge of the employee's claims under the federal act.

In enacting section 33-a, the legislature altered the law with respect to executory accords only to the extent that such an accord will be recognized as valid if embodied in a writing signed by the party against whom it is sought to be enforced, or his agent. Notwithstanding that explicit restriction, the court is apparently effecting an extension of the law beyond the limitations deliberately fixed by the legislature. If such a further change in the law is deemed [fol. 173] desirable, the remedy lies with the legislature. Certainly, no basis is to be found in section 113 of the Workmen's Compensation Law or imputing to the legislature an intention to extend the pertinent rule in this regard in the field of compensation claims by employee subject to the Federal Employers' Liability Act.

Moreover, the court's decision seems necessarily to be grounded on an implied finding as to the existence of an agreement between the parties in the nature of a binding executory accord. Even assuming that the court has the power—which I very much doubt (cf. *Murray Co. v. Lidgerwood Mfg. Co.*, 241 N. Y. 455, 458; *Shohfi v. Shohfi*, 303 N. Y. 370; *Matter of McGrinder v. Sullivan*, 290 N. Y. 11; Cohen and Karger, Powers of the New York Court of Appeals [1952], pp. 496-497)—to imply such a finding, when the Board, which alone has jurisdiction to pass upon any issues of fact in proceedings before it, did not make any such finding, but based its decision solely on a finding of waiver, laches and estoppel on the part of the employer, the decision in essence means that the almost invariable consequence of acceptance and payment of a temporary award is that the court will thereupon imply an agreement to supplant the federal with the state remedy. All the factors which are stressed in the majority opinion as predicates for implying such an agreement in this case are in essence to be found in almost any case in which one or more temporary awards of compensation have been paid and accepted. In other words, the mere fact that even one temporary award

has been paid and accepted without protest is apparently now to be invested with the force of a binding commitment by the parties to submit themselves to the aegis of a tribunal [fol. 174] completely without jurisdiction in contravention of the settled principle that neither waiver nor the consent or agreement of the parties can serve to confer jurisdiction where none exists.

I go further. Even if section 113 were to be given full effect in this case, the facts do not establish the requisite elements of the "waiver" envisaged by that section.

In *Fitzgerald v. Harbor Lighterage Co.* (*supra*, 244 N. Y. 132), as noted above, though the employee accepted payments under two temporary compensation awards covering a period of almost a year, and though no jurisdictional objection was voiced by any of the parties at the time of the making of such awards, this court held that section 113, even if valid, did not operate to extinguish the employee's right of action under the federal act, since "the waiver which it contemplates has never been announced." Thus, the court (per Cardozo, J.), declared (pp. 136-137): "Claimant, employer and insurance carrier must unite in foregoing their admiralty remedies before the statute will be operative, if its validity be assumed. * * * We put aside the question whether waiver by the claimant within the meaning of this section is sufficiently established by the election to file a claim, unaccompanied by express disclaimer of admiralty remedies. Even if this be assumed, the defendant is not helped unless employer and insurance carrier by some definitive expression have renounced *their* remedies as well. We see no basis for a finding that renunciation was effective when this action was begun. The employer had paid provisional or interlocutory awards for temporary disability. It may have been moved to this course by charity or by indifference or by dislike of litigation. Its acquiescence would not have barred it from appearing at the final hearing [fol. 175] and contesting the claim for any sufficient cause including lack of jurisdiction. * * * In the setting of the context, it [§ 113] imports a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another. Until that intention is announced by all who must participate, a waiver by any one of them is inchoate and revocable."

The mere payment and acceptance of temporary awards can no more be given the effect of a "renunciation" of the federal remedy herein, than they were in the *Fitzgerald* case (*supra*), notwithstanding the longer period covered by the payments in this case. The court's opinion in *Fitzgerald* cannot be read as assigning controlling importance to any one of the factors urged by Judge Conway (*supra*, pp. 553-554), and to distinguish that case on the grounds suggested is to ignore its basic rationale that the mere payment of temporary awards, amounting to "acquiescence", does not constitute a waiver or a renunciation by the employer of the right to challenge the unauthorized assumption of jurisdiction by the Board.

The order of the Appellate Division and the decision of the Workmen's Compensation Board should be reversed and the proceeding remitted to the Board for consideration of the objections raised by the employer to the Board's jurisdiction over the subject matter of this claim.

Loughran, Ch. J.; Lewis, Desmond, Dye and Froessel, JJ., concur with Conway, J.; Fuld, J., dissents in opinion.

Order affirmed.

[fol. 176] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER—March 28, 1952

The above named appellant, Employer and Self Insurer, having appealed to the Court of Appeals from an order of affirmance of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of that Court on November 27, 1950, and said appeal having been argued by Albert R. Connelly, Esq., of counsel for the appellant, and by Daniel Polansky, Assistant Attorney General, of counsel for the Workmen's Compensation Board, and the Court of Appeals after due deliberation having affirmed the order of the Appellate Division with costs, and having further ordered that the record and proceedings in that Court be remitted to the Appellate Division of the Supreme Court, Third Judicial Department,

there to be proceeded upon according to law; and the remittitur of the Court of Appeals having been filed in that Court,

[fol. 177] Now, on motion of Nathaniel L. Goldstein, Attorney General, attorney for the Workmen's Compensation Board, it is

Ordered, that the order of the Court of Appeals be and the same is hereby made the order of this Court, and it is further

Ordered, that the order of the Appellate Division appealed from be affirmed with costs as taxed in the sum of $160.00.

(S.) John S. Herrick, Clerk. (Seal:)

Ent. 3/28/52.

[fol. 178] In Court of Appeals of the State of New York

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—June 5, 1952

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York:

Petition for Appeal

Your Petitioner, South Buffalo Railway Company, considering itself aggrieved by the final judgment of this Court made and entered on March 13, 1952, in the above-entitled cause, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment for the reasons specified in the Assignment of Errors which is incorporated in this Petition; that a proper order be made with regard to the appeal bond to be given by the Petitioner; that a citation issue as provided by law; and that the material parts of the record, proceedings and papers upon which said final judgment was based, duly [fol. 179] authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Assignment of Errors

And the Petitioner assigns the following errors in the record and proceedings in said cause:

I. The Court of Appeals of the State of New York erred in deciding in favor of the validity of Section 113 of the New York State Workmen's Compensation Law as applied in this case, as against contentions of the Petitioner that the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States and the provisions of the Federal Employers' Liability Act forbid the application of such Section 113 in this case.

II. The Court of Appeals of the State of New York erred in holding that the Petitioner, by making payments of interlocutory awards of disability compensation under the New York State Workmen's Compensation Law, and the employee, by accepting such payments, thereby entered into an agreement of waiver under Section 113 of such Law which was valid as a settlement or compromise of a cause of action for personal injury under the Federal Employers' Liability Act.

III. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the New York Supreme Court, Third Department, which order affirmed an award and decision of the New York State Workmen's Compensation Board.

Prayer for Reversal

Wherefore, your Petitioner, South Buffalo Railway Company, prays that said final judgment of the Court of Ap-
[fol. 180] peals of the State of New York made and entered on March 13, 1952, in the above-entitled cause, be reversed and a judgment rendered in favor of your Petitioner, and for such other and further relief as to this Court may seem just and proper.

June 5, 1952.

Cravath, Swaine & Moore, Attorneys for Appellant,
15 Broad Street, New York 5, N. Y.

Hoyt A. Moore, Albert R. Connelly, Joseph W. Marlow,
Of Counsel.

[fol. 181] IN COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—June 5, 1952

South Buffalo Railway Company, Appellant in the above-entitled cause, having filed its Petition for Appeal, praying that it be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in said cause on March 13, 1952, and having also made and filed with said Petition its Assignment of Errors, Prayer for Reversal and its Statement as to Jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, it is hereby

Ordered that said appeal be, and the same hereby is, allowed as prayed for, and that the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, said Appellate Division being the court to which the record and proceedings in said cause have been remitted by remittitur of this Court according to law, shall within forty (40) days from the date of this [fol. 182] order make and transmit to the Supreme Court of the United States under his hand and the seal of said Appellate Division a true copy of the material parts of the record herein which shall be designated by praecipe and cross-praecipe (if any), all in accordance with Rule 10 of the Rules of the Supreme Court of the United States, and it is further

Ordered that an appeal bond in the sum of $500.00 be filed by and on behalf of said Appellant with good and sufficient surety.

June 5th, 1952.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 183-184] Service of appeal papers under Rule 12 (omitted in printing).

[fols. 185-188] Citation in usual form showing service on Alfred W. Jones, omitted in printing.

[fols. 189-191] Bond on appeal for $500.00 approved June 5, 1952, omitted in printing.

[fol. 192] Acknowledgement of Service (omitted in printing).

[fols. 193-197] Praecipe for Transcript of Record (omitted in printing).

[fol. 198] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 199] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 179

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION—Filed July 15, 1952

The Appellant, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, states that the points upon which it intends to rely in said Court in this case are as follows:

1. The Appellant hereby adopts its Assignment of Errors as and for its Statement of Points upon which it intends to rely in this case.

The Appellant hereby designates for the record in this case each and every paper enumerated in its Praecipe dated June 6, 1952, and served and filed herein, as necessary for

the consideration thereof, except that the following portions of the printed Record on Appeal to the Court of Appeals of the State of New York may be omitted:

1. Attending Physician's 48-Hour Preliminary Report, January 5, 1945; Report of Dr. Russell, May 21, 1945; Report of Dr. Leopold, June 5, 1945; Laboratory Examination, May 18, 1945 (page 42, line 1 (fol. 124), [fols. 200-202] through page 49, line 20 (fol. 146), of such printed Record).

2. Wage Statement, September 19, 1945; Notice to the Industrial Commissioner that the Payment of Compensation has been Stopped or Suspended, December 4, 1945; Minutes of Hearing held on March 6, 1945, March 27, 1945, May 1, 1945, May 22, 1945, July 3, 1945, January 8, 1946, and February 4, 1947 (page 51, line 1 (fol. 151), through page 123, line 9 (fol. 367), of such printed Record).

July 11, 1952.

Albert R. Connelly, Counsel for Appellant, 15 Broad Street, New York 5, N. Y.

To: Hon. Nathaniel L. Goldstein, Attorney General, State of New York, Counsel for Workmen's Compensation Board (New York), Appellee, 80 Centre Street, New York 13, N. Y.; Matthew Weimar, Esq., Counsel for Thomas J. Ahern and Gertrude Sloan Ahern, widow, Appellee, 1044 Ellicott Square Building, Buffalo, New York.

Acknowledgments of Service (omitted in printing).

[fol. 203] IN SUPREME COURT OF UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEE, WORKMEN'S COMPENSATION BOARD, OF ADDITIONAL MATERIAL PARTS OF RECORD—Filed July 18, 1952

The Appellee, Workmen's Compensation Board, hereby designates for the record in this case the following additional parts of the printed Record on Appeal of the Court of Appeals of the State of New York, which the Appellant has designated for omission but which should be included in the record as material and necessary for consideration.

(A) Entire minutes of hearings held on:

March 6, 1945 (fols. 161-165; pp. 54, 55)
March 27, 1945 (fols. 166-283; pp. 56-95)
May 1, 1945 (fols. 284-334; pp. 95-112)
May 22, 1945 (fols. 334-340; pp. 112-114)
July 3, 1945 (fols. 341-347; pp. 114-116)
January 8, 1946 (fols. 349-364; pp. 117-122).
February 4, 1947 (fols. 365-368; pp. 122, 123)

(B) The following portions of the wage statement, September 19, 1945:

Wage Statement, September 19, 1945

Name of Employer: South Buffalo Railway Company.
Name of Claimant: Thomas J. A'Hern.
Occupation of Claimant: Brakeman.
Employment No.: 600.
Earnings for one year preceding injury:
Date of Injury: July 1, 1944.

[fol. 204] Earnings: 2535.22

Earnings: Per Day: 8.86.
Compiled by: D. R. Daig.
Date: 9/19/45.

Approved:
J. F. Craig, Division Accountant (fols. 151-154)

(C) The following portions of the Notice to the Industrial Commissioner that the Payment of Compensation has been Stopped or Suspended, December 4, 1945:

Notice to the Industrial Commissioner That the Payment of Compensation Has Been Stopped or Suspended, December 4, 1945.

C-8

* * * * * * * *

5. Date of accident: July 1, 1944. Date disability began: July 2, 1944.

6. Date compensation began: July 2, 1944. * * *

7. Compensation paid to * * * June 6, 1945. * * *

8. Period of actual disability: 48 2/6 weeks

* * * * * * * *

In accordance with award of 9-24-45 .....

Total 1353.33

* * * * * * * *

14. On what date was the first compensation payment made? 12-4-45. Date of last payment: 12-4-45. Name of Insurance Carrier: South Buffalo Railway Company, Self Insured.

Signed by: C. F. Dullonkopf, Official title: Vice-President & General Supt.

Dated: Dec. 4, 1945. (fols. 155-161)

Dated: July 17, 1952.

Nathaniel L. Goldstein, Attorney General, State of New York, Counsel for Workmen's Compensation Board (New York), Appellee, 80 Centre Street, New York 13, N. Y.; Wendel P. Brown, Solicitor General.

Roy Wiedersum, Assistant Attorney General, Of Counsel.

[fols. 205-207] To: Albert R. Connelly, Esq., Counsel for Appellant, 15 Broad Street, New York 5, N. Y.; Matthew

Weimar, Esq., Counsel for Thomas J. Ahern and Gertrude Sloan Ahern, widow, Appellee, 1044 Ellicott Square Building, Buffalo, New York.

Acknowledgment of Service

Service of a copy of the foregoing Designation by Appellee, Workmen's Compensation Board, of Additional Material Parts of Record is hereby acknowledged this 17th day of July, 1952.

Albert R. Connelly, Counsel for Appellant.

Proof of service (omitted in printing).

[fol. 208] Supreme Court of the United States, October Term, 1952

No. 179

[Title omitted]

Order Noting Probable Jurisdiction—October 13, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Office - Supreme Court, U.
FILED
JUL - 5 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

No. 179

SOUTH BUFFALO RAILWAY COMPANY,
Appellant,

vs.

GERTRUDE SLOAN AHERN AND NEW YORK STATE WORKMEN'S COMPENSATION BOARD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

HOYT A. MOORE,
ALBERT R. CONNELLY,
JOSEPH W. MARLOW,
Counsel for Appellant.

CRAVATH, SWAINE & MOORE,
Of Counsel.

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COURT OF APPEALS OF THE STATE OF NEW YORK

OCTOBER TERM, 1952

No. 179

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE WORKMEN'S COMPENSATION LAW MADE BY THOMAS J. AHERN AND BY GERTRUDE SLOAN AHERN, WIDOW,

Claimant-Respondent,

against

SOUTH BUFFALO RAILWAY COMPANY, EMPLOYER AND SELF INSURER,

Appellant,

WORKMEN'S COMPENSATION BOARD,

Respondent

STATEMENT AS TO JURISDICTION

In compliance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the Court of Appeals of the State of New York which was made and entered in the above-entitled case on March 13, 1952.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 303 N.Y. 545 (Advance Sheets No. 677), 104 N.E. 2d 898. A copy of it is attached hereto as Appendix A.

The memorandum decision of the Appellate Division of the New York Supreme Court, Third Department, is reported at 277 App. Div. 1067, 100 N.Y.S. 2d 639. A copy of it is attached hereto as Appendix B.

The memorandum decision of the New York State Workmen's Compensation Board is unreported. A copy of it is attached hereto as Appendix C.

Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States over this appeal is Section 1257(2) of Title 28, United States Code (Supp. IV).

The State Statute the Validity of Which Is Involved

This appeal involves the validity, as applied in this case, of Section 113 of the New York State Workmen's Compensation Law (64 McKinney's Consolidated Laws of New York (1946), §113), which is as follows:

> "§ 113. *Interstate commerce.* The provisions of this chapter [that is, the New York State Workmen's Compensation Law] shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards

according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter." (Added by New York Laws of 1922, c. 615)

Date of Judgment Sought to be Reviewed and Date of Presentation of Petition for Appeal

The final judgment of the Court of Appeals of the State of New York was made and entered on March 13, 1952.

The petition for appeal is presented herewith on June 5, 1952.

Nature of the Case and the Rulings Which Give Jurisdiction

This appeal involves an award of disability compensation under the New York State Workmen's Compensation Law against appellant, a common carrier by railroad engaged in interstate commerce, in respect of a claim which clearly is subject to the provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended, Act of Aug. 11, 1939, c. 685, 53 Stat. 1404, 45 U.S.C. §§ 51 *et seq.*). The pertinent provisions of that Act are set forth in Appendix D hereto.

On January 15, 1945, Thomas J. Ahern (the deceased husband of appellee Gertrude Sloan Ahern), who had been employed as a brakeman by appellant, filed a claim for disability compensation with the New York State Workmen's Compensation Board (hereinafter called the Board) under the provisions of the New York State Workmen's Compensation Law (R., ff. 106-114). Such claim was predicated upon a coronary occlusion which Ahern allegedly suffered

on July 1, 1944, when he threw a switch on the railroad of the appellant (R., f. 110). In accordance with Board procedure, appellant filed with the Board a notice of controversy, dated February 1, 1945 (R., ff. 147-150), in which appellant first controverted the claim on grounds of accident and causal relation, and expressly reserved the right to controvert it for such other reasons as might later appear (R., f. 149). After hearings before a Referee of the Board at which evidence was adduced on the issues of accident and causal relation (R., ff. 162-348), an award was made in favor of Ahern on September 24, 1945, for disability compensation in respect of temporary total disability from July 1, 1944, to June 5, 1945, at the rate of $28 per week, and the case was continued for consideration of the extent and length of disability subsequent to June 5, 1945, and "all other issues" (R., ff. 43-47).

On October 11, 1945, appellant filed with the Board an application for review of the decision that Ahern suffered an accidental injury arising out of and in the course of his employment (R., ff. 86-89). That application was denied by the Board on November 15, 1945 (R., ff. 57-59). Thereafter, two additional interlocutory awards of disability compensation were made, one on January 10, 1946 (R. ff. 67-70), and the other on February 5, 1947 (R. ff. 71-75).

Ahern died on January 3, 1949. At a hearing before a Referee of the Board on January 18, 1949, with reference to a final award of disability compensation, appellant, in exercise of its right, which it had so reserved, challenged the jurisdiction of the Board and offered proof on that issue. The Referee ruled, however, that appellant could not controvert the claim on the ground that the Board did not have any jurisdiction in the matter (R., f. 370); that "once having taken jurisdiction in the matter, we continue jurisdiction" (R., ff. 370-371); and that thereafter the question of jurisdiction "is *res adjudicata*" (R., f. 371).

Following that ruling, a final award of disability compensation was made on January 24, 1949, and the case was continued for the preparation of a death claim (R., ff. 76-80).

On or about February 15, 1949, appellant filed with the Board an application for review or rehearing of the decision and award of the Referee on the ground that at the time of the alleged accident Ahern was employed by appellant in interstate commerce; that on that account the case came within the provisions of the Federal Employers' Liability Act; and that, therefore, the Board was without jurisdiction of the claim (R., ff. 91-105). The undisputed fact before the Board on such application showed that Ahern was employed by appellant "in the movement of railroad cars in interstate commerce" (R., f. 103).

The Board denied the application of appellant on May 2, 1949 (R., ff. 22-24), and ruled that in its opinion (stated in its Memorandum of Decision dated April 21, 1949, Appendix C) appellant had been guilty of laches and by its conduct had "waived its right to question the jurisdiction of the Workmen's Compensation Law" (R., f. 29). Accordingly, the Board refused to consider evidence that Ahern and appellant were engaged in interstate commerce at the time of the alleged accident and refused to review the rulings of the Referee (R., f. 30).

On appeal to the Appellate Division of the New York Supreme Court, Third Department, that court in a brief memorandum decision (277 App. Div. 1067, Appendix B) held that appellant had waived its right to question the jurisdiction of the Board.

On the ground that the construction of the Constitution of the United States was directly involved, appellant appealed as of right to the Court of Appeals of the State of New York under the provisions of Section 588(1)(a) of the New York Civil Practice Act (R., ff. 397-402).

On March 13, 1952, the Court of Appeals affirmed (one judge dissenting) the order of the Appellate Division. In its opinion (303 N.Y. 545, Appendix A), the Court of Appeals held that Section 113 of the New York State Workmen's Compensation Law was valid as against contentions that such Section was repugnant to the Constitution and laws of the United States (particularly the Federal Employers' Liability Act). That Court expressly recognized in its opinion that "It is well established that Congress, by enacting the Federal Employers' Liability Act, has preempted the entire field of liability in respect of personal injuries to railroad employees whose duties 'further' or 'directly' or 'closely * * * affect' interstate commerce, and that no room exists for State regulation or action in that field" (p. 550-551); and that the State of New York "is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce." (p. 551). The Court of Appeals then held that Section 113 "is a *permissive* statute intended to empower the board to make awards of compensation if all the parties elect to settle their dispute in that fashion, and forego their Federal rights and remedies"; that "It is not to be imposed upon them in the absence of a joint waiver or agreement evidencing an intention to be bound by its terms"; that "as so construed Section 113 does not conflict with the fundamental law of the land" and that "There is nothing contained in the Constitution of the United States which prohibits" such an agreement (p. 555). The Court of Appeals went on to hold that, even though there was not an express agreement between the parties settling their dispute, the facts in the case evidenced an intention having the force of an agreement to forego rights under the Federal Employers' Liability Act and to accept benefits under the New York State Workmen's Compensation Law. Such agreement, the Court found, precluded appellant from rais-

ing the question of the lack of jurisdiction of the Board over the subject matter of the claim.

A considerable part of the opinion of the Court of Appeals is devoted to a consideration of the validity under the Constitution and laws of the United States of Section 113 of the New York State Workmen's Compensation Law as applied in this case, and the holding of that Court was in favor of the validity of such Section as so applied.

Among the cases which appellant believes sustains jurisdiction of the Supreme Court of the United States over the appeal are

New York Central R.R. v. *Winfield*,
244 U.S. 147 (1917);
Erie R.R. v. *Winfield*,
244 U.S. 170 (1917);
Dahnke-Walker Milling Co. v. *Bondurant*,
257 U.S. 282 (1921).

The Fashion in Which the Federal Point Was Raised

As stated above, the opinion of the Court of Appeals of the State of New York (Appendix A) shows that the validity of a state statute, namely, Section 113 of the New York State Workmen's Compensation Law, was drawn into question in that Court, as repugnant to the Constitution and laws of the United States, and that the decision of the Court of Appeals was in favor of its validity. See *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185 (1945).

Appellant first raised the question of the jurisdiction of the Board over the claim of Ahern at the hearing before a Referee of the Board on January 18, 1949, at which appellant offered proof on the question of jurisdiction which was rejected by the referee on the grounds of "*res adjudicata*" (R. ff. 370-371).

In its application made to the Board on or about February 15, 1949, for review or rehearing of the decision and award of the Referee made on January 24, 1949, appellant again raised the question of the lack of jurisdiction of the Board on the grounds that Ahern was employed in interstate commerce; that the case, therefore, came within the terms of the Federal Employers' Liability Act and that the Board, therefore, did not have any jurisdiction. In support of that application appellant submitted the affidavit of its Assistant General Superintendent showing that Ahern, from the time of his employment in 1941 until the date of the alleged accident, had been employed almost every day in the movement of railroad cars in interstate commerce (R., ff. 95-105). The memorandum of decision of the Board denying that application (Appendix C) reiterated the contentions of appellant that

> "the Board is without jurisdiction since the deceased claimant was employed in interstate commerce and 'that this case come within the terms of the Federal Employer's Liability Act if any cause of action exists at all * * *'." (R., ff. 25-26.)

Upon appeal to the Appellate Division of the New York Supreme Court, Third Department, appellant again insisted upon the lack of jurisdiction of the Board over the claim of Ahern. It argued in its brief filed with that court that a state statute such as Section 113 of the New York State Workmen's Compensation Law could not constitutionally provide a method, either compulsory or optional, by which a claim covered by the Federal Employers' Liability Act could be subjected to the jurisdiction of a state workmen's compensation board pursuant to the terms of a state workmen's compensation law, and that the subject matter of the claim in issue came exclusively within the terms of

the Federal Employers' Liability Act. (Appellant's Brief before the Appellate Division, p. 4).

In its brief filed with the Court of Appeals of the State of New York, appellant again attacked the jurisdiction of the Board and argued that to construe Section 113 of the New York State Workmen's Compensation Law to authorize a waiver of jurisdiction over the subject matter would put it in irreconcilable conflict with the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States. In its argument on that point appellant pointed out that the Supreme Court of the United States in *Erie R.R.* v. *Winfield*, 244 U.S. 170 (1917), had held that, in enacting the Federal Employers' Liability Act, the Congress took "without the reach of state laws" the entire subject of the liability of railroad companies for injury to or the death of their employees while engaged in interstate commerce. Appellant argued also that the finding that it had waived or by estoppel had lost its right to question the jurisdiction of the Board would permit a statutory tribunal of the State of New York to interfere in a field which had been pre-empted by the Congress and that any attempt to apply Section 113 under the facts and circumstances in this case would be unconstitutional. (Appellant's Brief before the Court of Appeals, pp. 28-30.)

The Questions Involved Are Substantial

This case involves a substantial question relating to the application of state workmen's compensation laws *vis-a-vis* the Federal Employers' Liability Act which has not heretofore been directly presented to, or decided by, the Supreme Court of the United States.

The contention of appellant was and is that, under the provisions of Section 8, Article I, of the Constitution of the United States and of the Federal Employers' Liability Act,

Section 113 of the New York State Workmen's Compensation Law as it has been construed in this case can not constitutionally be applied so as to give jurisdiction to the Board to make an award in respect of a claim subject to the exclusive provisions of the Federal Employers' Liability Act.

Article I, Section 8, Clause 3, of the Constitution of the United States gives to the Congress the power to "regulate Commerce with foreign Nations and among the several States" and Clause 18 of such Section 8 gives to the Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers". Acting thereunder, the Congress enacted the Federal Employers' Liability Act to provide for the liability of common carriers by railroad in respect of personal injuries to their employees while employed by such carriers in interstate commerce. Those provisions were the basis of the holdings of the Supreme Court of the United States in *New York Central R.R.* v. *Winfield*, 244 U.S. 147 (1917), and *Erie R.R.* v. *Winfield*, 244 U.S. 170 (1917), to the effect that the Congress, in enacting the Federal Employers' Liability Act, pre-empted the entire field of liability in respect of injury to or the death of railroad employees while they are engaged in interstate commerce and that any State regulation or action which interferes in that field is invalid.

Under the Supremacy Clause of Article VI, Clause 2, of the Constitution of the United States, the Federal Employers' Liability Act, no less than the Constitution itself, is made "the supreme Law of the Land: . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under those constitutional and statutory provisions Section 113 of the New York State Workmen's Compensation Law is clearly invalid as applied in this case.

The Court of Appeals in its opinion purported to recognize the exclusiveness of the Federal Employers' Liability Act, saying that the State of New York "is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce." (303 N.Y. 545, 551). It nevertheless did in effect permit the State of New York to invade that field by holding that the parties through their acts had waived their Federal rights and that therefore the Board, under the provisions of Section 113 of the Workmen's Compensation Law, had jurisdiction to make the award in question. It reached that conclusion in the face of the fundamental principle that a determination made by a tribunal that is without jurisdiction of the subject matter is a nullity and that the lack of jurisdiction cannot be waived or overcome by the consent or agreement of the parties. *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *United States* v. *Corrick*, 298 U.S. 435, 440 (1936). See also *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877); *Scott* v. *McNeal*, 154 U.S. 34, 46 (1894).

The Congress, by enacting the Federal Employers' Liability Act, provided a proper and eminently desirable solution to the vexing and chaotic problem arising out of the enforcement of widely divergent State laws against interstate carriers by railroad and laid down a uniform rule prescribing the liability of such carriers to their employees in respect of personal injuries while engaged in interstate commerce. *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 150, 153 (1917); *Erie R.R.* v. *Winfield*, 244 U.S. 170, 172 (1917). The Supreme Court of the United States has recognized the eminent desirability of that principle and insisted upon its application. *Brown* v. *Western R. of Alabama*, 338 U.S. 294 (1949); *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952). But the construction which the Court of Appeals of the State of New York has given to Section

113 of the New York State Workmen's Compensation Law does violence to that principle and to the public policy which it reflects, and, if allowed to stand, would have the most far-reaching and disturbing implications. See *McCahan Sugar Refining & Molasses Co.* v. *Stoffel*, 41 F. 2d 651, 653-654 (3d Cir. 1930).

The Court of Appeals in this case has implied or presumed a binding settlement "agreement" from the payment and acceptance of interloeutory awards of disability compensation in a proceeding in which there was not any reference whatsoever to the question of the jurisdiction of the Board or to the Federal Employers' Liability Act. Moreover, it has held that, by the "agreement" so implied or presumed, the parties indicated their willingness to accept any award that might thereafter be made by the Board in lieu of any determination under the Federal Employers' Liability Act. It is perfectly obvious that such an interpretation has the effect of compelling the parties to submit to the jurisdiction of the Board and serves as a ready vehicle for circumventing the jurisdictional limitations upon the State of New York and its statutory tribunals which are prescribed by the Constitution and laws of the United States.

Section 113 as construed by the Court of Appeals in this case falls within the proscription against state action enunciated by the Supreme Court of the United States in *Erie R.R.* v. *Winfield*, 244 U.S. 170 (1917). The New Jersey workmen's compensation statute there in question provided in part that, unless the contract of hiring or a notice from one party to another contained an express statement in writing to the contrary, it should be presumed that the parties had agreed to be bound by such statute. The Supreme Court of the United States there

held (p. 174) that it was "beyond the power of any State to interfere with the operation" of the Federal Employers' Liability Act, "either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption". It is clear that Section 113 as construed by the Court of Appeals in this case has the same effect as that statute since, by paying and accepting interlocutory awards of the Board, the parties are presumed to have elected to be bound by the provisions of the New York State Workmen's Compensation Law and to have waived any rights under the Federal Employers' Liability Act.

The Court of Appeals, in construing Section 113 as it has in this case, has distorted the decisions of the Supreme Court of the United States with respect to the settlement and compromise of personal injury actions under the Federal Employers' Liability Act. *Duncan* v. *Thompson*, 315 U.S. 1 (1942); *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625 (1948). There is a vast and controlling distinction between a full compromise entered into in writing by the parties with full regard for their rights under the Federal Employers' Liability Act and an implied "agreement" such as the Court of Appeals has found in this case, where the parties have been held to have waived their Federal rights by paying and accepting awards of compensation by the Board.

The factual situation involved in the decision of the United States Court of Appeals for the Second Circuit in *Heagney* v. *Brooklyn Eastern District Terminal*, 190 F. 2d 976 (1951); *cert. denied*, 342 U.S. 920 (1952), to which the Court of Appeals of the State of New York referred in its opinion, is entirely different from the factual situation in

the instant case. In that case the parties had expressly contracted with reference to the question of the jurisdiction of the Board and thereafter, pursuant to the directions of the Board, the employer in that case tendered and the employee accepted a number of interlocutory awards of compensation. A majority of the Court in the *Heagney* case found that the parties had made an agreement which they intended to constitute an accord and satisfaction (190 F.2d, at p. 980). In the instant case the parties have been found to have waived their Federal rights in a proceeding in which such an agreement was not made.

The questions involved in this case are of the greatest substance. The effect of the decision of the Court of Appeals of the State of New York in this case is that the mere payment and acceptance of a single interlocutory award of workmen's compensation may be construed to have the force of a binding agreement by the parties to submit themselves to a tribunal completely without jurisdiction and whose rule of liability is totally at variance with the uniform rule of liability which the Congress by enacting the Federal Employers' Liability Act has laid down for interstate carriers by railroad. The importance of the questions in this case is therefore not limited to the single injury in issue but has probable application to injuries occurring to many thousands of railway workers in the State of New York and elsewhere.

Conclusion

In this case there was drawn into question before the highest court of the State of New York the validity of a State statute on the ground of its being repugnant both to the Constitution and the laws of the United States, and the decision of that court is in favor of its validity. The questions involved are of genuine substance and importance.

It is, therefore, respectfully submitted that appellant is entitled as of right to review of the case by the Supreme Court of the United States.

June 5, 1952

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ALBERT R. CONNELLY,
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Of Counsel.

APPENDIX A

Opinion of the Court of Appeals of the State of New York (303 N. Y. 545)

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1950, which unanimously affirmed a decision and award of the Workmen's Compensation Board made under the Workmen's Compensation Law denying an application by the above-named appellant employer, South Buffalo Railway Company, for a review of rehearing of an award entered upon a decision of a referee granting disability benefits to claimant, as the widow of Thomas J. Ahern, an employee of the appellant employer, up to the date of death of said employee.

CONWAY, *J.* This is an appeal by the self-insured employer from an order of the Appellate Division of the Supreme Court, Third Department, entered November 27, 1950, unanimously affirming a decision made by the Workmen's Compensation Board, pursuant to the provisions of the Workmen's Compensation Law, which denied the employer's application for a review or rehearing of a referee's decision allowing disability compensation to the widow of Thomas J. Ahern, the deceased employee, for a period up to and including the date of the employee's death. The case was continued for the preparation of a death claim by the widow of the decedent.

A motion for permission to appeal to this court was denied upon the ground that an appeal therefrom to this court lies as of right. (302 N.Y. 877.)

In January, 1945, Thomas J. Ahern, the decedent, who had been employed as a switchman by the South Buffalo Railway Company (hereinafter called the Railway Company) at Lackawanna, New York, where the employer had its principal place of business, filed a claim for disability compensation with the board. The claim was based upon a coronary occlusion which the decedent suffered on July 1, 1944. It was the decedent's claim that he was engaged in the regular course of his employment while attempting to

throw a switch which had become stuck, and was compelled to use extra exertion which brought about the occlusion, with resultant disability. In its notice to the board dated February 1, 1945, the Railway Company controverted the claim on the grounds of accident and causal relation, expressly reserving the right to controvert the claim for such other reasons as might later appear. Several hearings were held between March and July, 1945.

An award of compensation was rendered in favor of the decedent in September, 1945, for disability compensation in respect of temporary total disability from July 1, 1944, to June 5, 1945. The case was continued for consideration of the extent and length of disability subsequent to June 5, 1945.

The employer paid this initial award in the sum of $1,353.33.

A second award was made in favor of the decedent on January 10, 1946, for the period from June 5, 1945, to January 8, 1946.

A third award was rendered on February 5, 1947, for the period from January 8, 1946, to February 4, 1947, and payments were directed to be continued by the employer.

The employer paid all of the awards and continued to pay compensation to December 20, 1948, in accordance with the order of the board.

The total amount of compensation paid by the employer to the decedent, for the four and one-half-year period amounted to the sum of $5,528.66.

On January 3, 1949, the decedent died as a result of his heart condition. On January 18, 1949, a hearing was held before the referee at which the decedent's widow was requested to file a death claim. At that hearing, the question of the widow's right to an award for disability compensation for the unpaid two-week period up to the time of decedent's death arose. It was at that hearing that the employer, for the first time, challenged the jurisdiction of the board and thus sought to controvert the disability claim. The employer sought to raise the same objection to any claim for death benefits. The referee then rendered the award now on appeal for disability compensation for the final two-week

period preceding death, to which reference has been made.

Thereafter in February, 1949, the Railway Company filed with the board an application for review or rehearing of the decision and award of the referee on the ground that at the time of the accident the decedent was employed by the Railway Company in interstate commerce; that under these circumstances the case came within the provisions of the Federal Employers' Liability Act; and that, therefore, the board was without jurisdiction of the claim. The board denied that application.

On appeal the Appellate Division confirmed the board's determination.

On the oral argument before us counsel for the Railway Company stated that it is not seeking to recover the payments covering disability from July 1, 1944 (the date of the accident) until December 20, 1948 (the date of the last payment made), but that it is attacking the award of two weeks compensation ($56) made to the decedent's widow for the period from December 20, 1948, until the decedent's death. The Railway Company contends that the determinations of the board and the Appellate Division were improper and should be reversed and that the proceeding should be remanded to the board for submission of proof as to jurisdiction of the board over the subject matter of the proceeding.

It is well established that Congress, by enacting the Federal Employers' Liability Act, has pre-empted the entire field of liability in respect of personal injuries to railroad employees whose duties "further" or "directly" or "closely * * * affect" interstate commerce, and that no room exists for State regulation or action in that field. (Federal Employers' Liability Act, § 1; U. S. Code, tit. 45, § 51; *Matter of Baird* v. *New York Central R. R. Co.*, 299 N.Y. 213, 215-216; *New York Central R. R. Co.* v. *Winfield*, 244 U.S. 147, 152, 153; *Matter of Wright* v. *New York Central R. R. Co.*, 288 N.Y. 719; *Erie R. R. Co.* v. *Winfield*, 244 U.S. 170, 172.) This is true even as to injuries occurring without fault, as to which the Federal Employers' Liability Act provides no remedy. (*New York Central R. R. Co.* v. *Winfield*, *supra*.)

In *Matter of Newham* v. *Chile Exploration Co.* (232 N.Y. 37, 42), and *Matter of Doey* v. *Howland Co.* (224 N.Y. 30), we have had occasion to consider the question of waiver of lack of jurisdiction of the board.

In the *Newham* case (*supra*) we held that the fact that an employer had agreed to bring before the appellate courts of this State solely the question of the claimant's employment did not operate as a waiver of his right to question the jurisdiction of the board thereafter; and in the *Doey* case (*supra*) we held that an employer, who had recognized the validity of a board award and made payments thereon, was not precluded from moving to vacate the award on the ground of lack of jurisdiction, where subsequent to the payments under such award the United States Supreme Court determined that the New York State Workmen's Compensation Law was void insofar as it applied to persons engaged in maritime work, such as the employee. In this latter case we concluded that since the board lacked jurisdiction to render the award, any award in fact made by the board was a nullity and would be so treated at any time the parties saw fit to question it by either a direct or collateral attack.

The foregoing cases establish unequivocally that the State is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce. There is another avenue of approach to the problem which bears exploration, however.

The Federal Employers' Liability Act (Act, § 5; U. S. Code, tit. 45, § 55), makes void any "contract, rule, regulation, or device whatsoever" to exempt a carrier from liability. Notwithstanding that provision, the right of the employee to dispose of a claim he may have against his employer by entering into a compromise of his dispute is a right of contract which Congress did not intend to impugn. The employee may adjust "his own affairs in his own way after a cause of action has arisen in his favor, so long as such adjustment is fair and violates neither public policy nor some proper and enforceable statutory provision." (*Anderson* v. *Oregon Short Line R. Co.*, 47 Utah 614, 620.) That section forbids only contracts before injury exempting the master from liability and has no application to a con-

tract of settlement. (*Ballenger* v. *Southern Ry. Co.*, 106 S.C. 200, 203.) Thus, the Supreme Court of the United States has held that that provision does not operate to prevent an otherwise valid release of a claim by an individual engaged in interstate commerce since "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." (*Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, 631.) In the more recent case of *Boyd* v. *Grand Trunk W. R. Co.* (338 U.S. 263, 266), an agreement which sought to limit the venue of an action that might thereafter be brought by an employee under the Federal Employers' Liability Act was held invalid as contravening the act, but the court reaffirmed the ruling in the *Callen* case characterizing the agreement therein as a "full compromise enabling the parties to settle their dispute without litigation, which * * * did not contravene the Act".

Prior to the decision in the Callen case (*supra*) we held in *Brassel* v. *Electric Welding Co.* (239 N.Y. 78), that where an employee engaged in maritime work had accepted a final award of the New York State Workmen's Compensation Board, his cause of action for damages growing out of the same injuries, though based upon maritime law, was extinguished. At page 80 we declared: "We think the acceptance of the payment has destroyed the right of action. The question is not whether the award has the effect of a binding adjudication. We may assume that it is void, and that, at least while unpaid, it might have been set aside or disregarded (*Matter of Doey* v. *Howland Co., Inc.*, 224 N.Y. 30). The question is whether a right of action has survived the collection of the award and the retention of the proceeds."

On the other hand, in *Larscy* v. *Hogan & Sons, Inc.* (239 N.Y. 298, 301-302), where an employee entered into an agreement with his employer, the employee to receive and the employer to pay, a sum which might be awarded the employee as compensation for injuries received in an accident while engaged in maritime work, and thereafter received part payment, although no award had been made by the board, but refused to receive the balance and commenced an action to recover damages for negligence, we held that

"The agreement may have amounted to an accord but payment only would amount to a satisfaction. Until there were an accord and satisfaction of plaintiff's claim by full and complete payment, the plaintiff was not barred from maintaining his action for negligence." Of course, the cause of action for damages was held to be subject to a setoff to the extent of partial payment.

The *Brassel* and *Larscy* cases (*supra*), although decided in 1924 and 1925, represent the state of the law as it existed prior to 1922 when the injuries in those cases took place. At that time section 114 of the New York Workmen's Compensation Law declared that the act applied to persons engaged in intrastate commerce and interstate or foreign commerce only to the extent that their mutual connection with intrastate work was clearly separable from interstate or foreign commerce. In 1922 (L. 1922, ch. 615), section 114 of the Compensation Law was renumbered section 113 and the following addition was made by the Legislature: "awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

In 1926, in *Fitzgerald* v. *Harbor Lighterage Co.* (244 N.Y. 132, Cardozo, J.), we considered, for the first time, the statutory addition to section 113. It is interesting to note that we have not had occasion to consider that addition since the *Fitzgerald* case. There the plaintiff was injured on a vessel while working as a stevedore in navigable waters. He filed a claim for compensation for the resultant disability. The employer submitted to the jurisdiction of the board. Two awards were made and paid and the case was placed "on the final adjustment calendar". Thereafter the plaintiff commenced a suit for damages. We discussed the *Brassel* and *Larscy* cases (*supra*) and made the following observation (pp. 135, 136): "The decision in *Larscy* v. *Hogan & Sons, Inc.*, is decisive of the case at bar, unless an amendment of the statute, which took effect June 1, 1922 [the

addition to § 113], after Larscy had been injured, has changed the previously existing rule. * * * *We find it unnecessary to determine whether waiver in accordance with this section would supersede the remedy in admiralty.* Construing our own statute, we hold that the waiver which it contemplates has never been announced." (Emphasis supplied.) In construing the amendment to section 113 we wrote at page 137: "In the setting of the context, it imports a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another. Until that intention is announced by all who must participate, a waiver by any one of them is inchoate and revocable."

Here, it is clear, that we must construe the addition to section 113, in the words of Judge Cardozo, "In the setting of the context," and it is equally clear that there is present in the facts already detailed "a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another," and that such intention has been announced by all who must participate in such an agreement.

In the Report of the Joint Legislative Committee (N. Y. Legis. Doc., 1922, No. 55) which recommended the enactment of the above-quoted addition to the New York Workmen's Compensation Law, the following statement appears (p. 12): "The proposed amendment will permit those who choose to elect to accept the provisions of our law to so elect, and the one to pay [and] the other to accept compensation thereunder."

In the light of the wording of the addition to section 113 providing for waiver and the statement of legislative intent above quoted, it cannot be urged that the statute was intended simply to codify the rule that only a final award of the board, made and paid, precludes an individual from asserting his Federal rights. If that were so, section 113 would be meaningless. It provides that if the parties waive their Federal rights and remedies the board may act. If the payment of a final award be deemed the waiver, then there is nothing further for the board to do, and no reason for it to act. Obviously then, section 113 means

to do more than codify the rule which is laid down in the early cases. To our mind, the language of the section and that of the legislative committee which recommended its enactment plainly indicates that is a *permissive* statute intended to empower the board to make awards of compensation if all of the parties elect to settle their dispute in that fashion, and forego their Federal rights and remedies. It is not to be imposed upon them in the absence of a joint waiver or agreement evidencing an intention to be bound by its terms. In thus construing that section, we have been guided by the familiar principle of our jurisprudence that the courts are reluctant, and it is only as a last resort, that they will strike down a solemn legislative enactment on the ground that it is unconstitutional. We believe that the interpretation above given to section 113 of our Workmen's Compensation Law, is clearly the proper interpretation, and that as so construed section 113 does not conflict with the fundamental law of the land.

There is nothing contained in the Constitution of the United States which prohibits, nor has the United States Supreme Court held, that, after an accident, all interested parties may not dispose of their controversy as they themselves see fit, provided that the means whereby such dispute is settled or adjusted does not violate public policy. If all of the parties agree that the employer and carrier will pay and the employee will accept compensation, in the amounts and manner provided by the workmen's compensation statute of a State, rather than resort to litigation and the State has permitted its compensation board to make awards under such circumstanes, we can conceive of no valid objection to such an arrangement. If the parties agree on a sum of money to be paid in discharge of the claim for personal injuries, such agreement, if there has been no overreaching or fraud, does not violate any constitutional provision, Federal legislation or announced public policy. Neither is there any sound reason why the parties may not designate an impartial third person or group of persons to determine the amount to be paid in extinguishment of the claim. To our mind that is all that

section 113 of the Workmen's Compensation Law purports to accomplish.

Clearly the State of New York cannot circumvent by statute the ruling that Congress has pre-empted the entire field of liability in respect of personal injuries to persons engaged in interstate commerce and no room exists for State regulation in that field. (*New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, *supra*.) Thus if the Legislature were to declare arbitrarily that certain conduct constitutes a waiver or agreement to forego Federal rights and remedies where, as a matter of fact such conduct does not evidence a compromise agreement, the statute would be violative of the Federal Constitution. In *Erie R. R. Co.* v. *Winfield* (244 U. S. 170, *supra*), the United States Supreme Court construed such a statute. In that case, the claimant, employed by a railroad engaged in both interstate and intrastate commerce, was struck by an engine and received injuries from which he died. No causal negligence was alleged or proved and both parties assumed there was none. The Trial Judge held that the employee was not employed in interstate commerce at the time of the accident and that compensation should be made to the widow under the State (New Jersey) statute. A judgment in her favor was entered, but reversed by the Supreme Court of the State on the ground that the employee was engaged in interstate commerce at the time of the accident and that the case was controlled by the Federal Employers' Liability Act. That judgment was in turn reversed by the Court of Errors and Appeals on the ground that the Federal act was inapplicable in the absence of causal negligence. The United States Supreme Court declared that three questions were presented for decision: (1) whether the Federal act was regulative of the carrier's liability even where no negligence is shown, (2) whether the facts established that the deceased was engaged in interstate commerce at the time of the accident, and (3) "whether by reason of the state statute the carrier became bound contractually to make compensation in this instance, even though it came within the federal act." (P. 172.)

The court answered the first two questions in the affirm-

ative. In determining the third question the court pointed out that the New Jersey statute in question consisted of two parts. One part dealt with liability founded upon negligence and the other liability in the absence of negligence if the injury to the employee was an incident of the service in which he was employed. The latter part was described as "elective" and not to be applied unless the employer and employee, expressly or impliedly, agreed to be bound thereby and surrender their rights to any other form of compensation.

With respect to the means by which such agreement was to be manifested the statute provided that every contract of hiring "shall be *presumed* to have been made" with reference to that part of the statute and unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be *presumed*" that the parties "have agreed to be bound" by that part of the statute. (Emphasis supplied.) The court stated at pages 173-174: "There was no *express* agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here * * *." (Emphasis supplied.) The court held that it was beyond the power of a State to interfere with the operation of the Federal Employers' Liability Act "by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory *presumption*." (Emphasis supplied.)

It will be seen that the court did not declare that it is beyond the power of a State to enact a statute conferring upon the employer, employee and insurance carrier the privilege of compromising their dispute by submitting it to the board. Moreover, the language of the Supreme Court in the *Erie* case (*supra*) above quoted, indicates that the court would have reached a different result had the parties *actually agreed* to forego their Federal rights and remedies.

Section 113 of the New York Workmen's Compensation Law, unlike the New Jersey statute, does not require the parties to choose between the Federal act and the State Workmen's Compensation Law, nor does it impute such an election to them by means of a presumption as did the New Jersey statute. Section 113 merely offers the parties a means whereby they may compromise their dispute, if they are *mutually desirous* of so doing.

No constitutional provision, Federal statute or Federal court holding has been called to our attention, which prohibits a State Legislature from giving effect to the lawful words and/or acts of the parties. The Legislature of the State of New York has said, through section 113 of the Workmen's Compensation Law, that when the words and/or acts of the parties clearly establish that the parties desire to have the State Compensation Board award compensation rather than be compelled to litigate their differences, the board may award compensation. We do not think that any fault may be found with such a statute.

The United States Court of Appeals for the Second Circuit has recently considered, in the case of *Heagney* v. *Brooklyn Eastern Dist. Terminal* (190 F. 2d 976, certiorari denied 342 U. S. 920), section 113 of our Compensation Law, and the conclusion of that court that the section is valid and that the agreement of the parties to abide by the awards of the State board, plus payment of a substantial number of such awards, constitute a release or compromise of the parties' rights under the Federal act, is in agreement with the position that we have outlined above.

In that case the plaintiff, a hostler working atop one of the defendant's locomotives, brought an action in a Federal District Court pursuant to the provisions of the Federal Employers' Liability Act, to recover damages for injuries sustained when he slipped on some grease and fell to the ground. Two years prior to the commencement of the suit the plaintiff had signed a statement for the employer describing the accident and said: "I have no intention of suing my employer but going to take voluntary compensation." The employer began to pay compensation on February 17, 1947, at the maximum rate allowed by New

York law. Thereafter, a clerk of the New York State Workmen's Compensation Board informed the defendant that a hearing was to be held, the purpose of which was "Question of Jurisdiction." At the hearing the defendant's representative declared that it was waiving the question of jurisdiction and paying compensation. The referee then prepared a record entitled "Notice of Decision and Award." Under the section designated "Decision" the record stated: "Accident, notice, causal relation established. Case continued." Several hearings were held thereafter and compensation payments were continued. On January 6, 1949, almost two years after the accident, the plaintiff notified the defendant that he was "making claim under the federal law and had the case closed 'without prejudice' before the Board" (p. 977). The employer asserted its willingness to make further compensation payments in accordance with the order of the State board. As a defense to the claim for damages the employer pleaded waiver under section 113 of the New York Compensation Law. The employer then moved for summary judgment dismissing plaintiff's action on the ground that he had waived Federal remedies by the acceptance of awards of the board. The United States District Court for the Eastern District of New York granted the motion and dismissed the complaint. The United States Court of Appeals for the Second Circuit affirmed, holding that the employee had waived, under the provisions of section 113 of the New York Workmen's Compensation Law, his Federal rights and remedies, and that section 113 was valid and binding upon the employee.

It is to be noted that in that case the employee expressly declared that he had no intention of suing his employer but wished to receive voluntary compensation. The employer, in turn, expressly declared that it was waiving the "Question of Jurisdiction." The parties submitted to the jurisdiction of the board and pursuant to the direction of that board the employer tendered and the employee accepted a number of interlocutory awards.

It was the employee's contention that "waiver is insufficient; there must be an 'accord and satisfaction,' meaning

thereby a 'final award' by the Board duly paid and accepted." (P. 978.)

The United States Court of Appeals concluded, to use the words of Judge Frank who dissented, that "His [plaintiff's] agreement, plus payment by defendant of a substantial portion of those partial awards, constituted a release or 'full compromise' of whatever he might otherwise have recovered by suit under the federal statutes, and thus constituted a complete defense to plaintiff's present suit." (P. 980.)

Several of the statements of the majority of the court bear repetition here. At page 978 it was said: "When counsel came into the case and conducted its prosecution over many months, with obvious success signalized by increased or additional awards, only to raise this issue at a late date when the end of state compensation was apparently approaching, there should no longer be any possible doubt as to the waiver." The court continued: "Hence there was no genuine issue as to the fact of waiver, and the only question which remains is as to its validity."

The court then considered the employee's claim that "waiver is insufficient", and that "there must be an 'accord and satisfaction' ". In discussing that question the court recognized the general rule that a claim is not discharged until the accord executory or agreement is satisfied or performed but pointed out that the phrase "executory accord" is a confusing one, and that the test to be applied in determining whether the parties have given up their Federal rights is as follows: "What we must look for, therefore, is a fair compromise whereby the parties settle their dispute in substitution for the litigation permitted by the Federal Acts; there is no mystic significance to be accorded a 'satisfaction' upon some assumed 'final award.' When a state procedure accomplishes just that by agreement of all concerned, it should therefore be at least as valid as a formal release secured on payment of a few hundred dollars. And certainly no invidious distinction should be made so that only a purely temporary injury can be settled in this way, and that any permanent injury is excluded from settlement

just because the state process requires continuing payments for the good of the injured employee." (P. 979.)

In the *Heagney* case (*supra*), the employee—the one seeking to escape from his declared intention and to question jurisdiction of the board—made his agreement in words. In the case now before us the employer which made its agreement by conduct rather than declared intention, must be held to be equally bound since in the law there is no distinction between agreements made by words and those made by conduct. There was an equal disclosure of intention to settle the dispute through the board "in substitution for the litigation permitted by the Federal Acts". It is elementary that there can be no agreement unless all of the parties involved intended to enter into one. Moreover, it is well-established contract law that in determining whether the parties possessed the necessary intention to contract, an objective test is generally to be applied. That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling. Thus, in *Hotchkiss* v. *National City Bank of New York* (200 F. 287, 293, L. Hand, J., affd. 201 F. 664, affd. *sub nom. National City Bank* v. *Hotchkiss*, 231 U. S. 50), it was said: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." (See, also, *Amend* v. *Hurley*, 293 N.Y. 587, 596; *Porter* v. *Commercial Cas. Ins. Co.*, 292 N.Y. 176, 183-184.) An agreement by conduct does not differ from an express agreement, except in the manner by which its existence is established.

In the case now before us it is clear that there was no agreement between the parties when the initial hearings were held. At that time the employer had not agreed with

the employee as to the amount the deceased was to receive, nor did it agree to have the board determine the sum to be paid. At the initial hearings held between March 6, 1945, and July 3, 1946, the employer indicated its unwillingness to have the board act by controverting the claim on the issues of accident and causal relation. Furthermore, we do not think that it may be said that the employee was then disposed to declare that, in filing a claim, he was prepared to abide by the ruling of the board, so as to be foreclosed from claiming his Federal rights should the board deny him compensation. However, it is clear that the conduct of the parties subsequent to the board's ruling on the questions of accident and causal relation and its decree that compensation be paid, establishes, as conclusively as the evidence in the *Heagney* case (*supra*), that it was the mutual desire of the parties that the board, acting as an impartial third person, should determine the amount to be paid in discharge of the claim by the deceased.

On the oral argument counsel for the employer asserted that its conduct in denying accident and causal relation on the initial hearings establishes that the payments of compensation made by the employer thereafter were involuntary payments, and that its acquiescence or submission to the determinations of the board should not be construed as a joint waiver or accord and satisfaction.

The employer, in thus arguing, overlooks the fact that its other conduct belies its protestations of lack of intent and does evince the intention to enter into a compromise whereby the dispute in question might be settled without litigation: *First:* No appeal was ever taken by the employer from any of the awards made except that herein which has to do with the award covering the last two weeks of the decedent's life, and *second:* From the outset the employer was represented by counsel and is chargeable with the knowledge that the board was powerless to require it to pay compensation unless it waived its Federal rights and remedies. The records in our court commencing with *Ives* v. *South Buffalo Ry. Co.* (201 N.Y. 271), and continuing through *Herke* v. *South Buffalo Ry. Co.* (227 N.Y. 618) and *Keogh* v. *South Buffalo Ry. Co.* (233 N.Y. 31) indicate

clearly that the various counsel for the Railway Company, and thus the Railway Company, over the last forty years have been cognizant of the nature of its liability to its employees, and the remedies of the latter both under the Compensation Law and the Federal Employers' Liability Act. Nevertheless, the employer made payments for four and one-half years in accordance with the directions of the board, *choosing not to assert that the board lacked jurisdiction.* The payments of awards by and silence of the employer is significant in this case. An individual's silence may not be construed as the acceptance of an offer unless there is a duty to speak imposed on that person. However, we think that such a duty rested on the employer here. The Federal Employers' Liability Act (Act, § 6; U. S. Code, tit. 45, § 56) provides that no action may be maintained under its terms "unless commenced within three years from the day the cause of action accrued." The employer herein was aware that the employee desired to have the board determine the payments to be made in discharge of his claim rather than resort to litigation, and with this knowledge it continued to make payments beyond the time when the Statute of Limitations had run on the plaintiff's claim for negligence under the Federal act—indeed, it has run as to the death claim, too. The employer cannot validly urge that it should be permitted to make payments beyond the period of the Statute of Limitations, thus leading the employee to believe that it was equally agreeable to the employer that the board act, without having its silence construed as an acceptance of the employee's offer to compromise the claim by having the amount of the claim fixed by the board. It may not be said that the employer would be estopped from asserting the Statute of Limitations on the ground that, by its conduct, it had misled the decedent and his widow to their detriment. The Federal and State courts have said that the Statute of Limitations in the Federal Employers' Liability Act is a limitation on the right and that if the action is not commenced in time, the right, not merely the remedy, is lost. (See e.g. *American R. Co. of Porto Rico* v. *Coronas*, 230 F. 545, 546; *Taylor* v. *Southern Ry. Co.*, 6 F. Supp. 259, 260; *Bement* v. *Grand*

Rapids & Ind. Ry. Co., 194 Mich. 64, 66-68; *Gauthier* v. *Atchison T. & S. F. Ry. Co.*, 176 Wis. 245, 247-249.)

The employee's intention to thus settle the dispute is equally clear. The employee filed his claim for workmen's compensation six months after the accident. At the first hearing, held less than two months thereafter, he was represented by counsel. We must assume that at that time he was fully aware of any Federal rights that he might possess. Furthermore, he was bound to know, whether in fact he did know, that the New York Workmen's Compensation Board was powerless to award him compensation unless he waived his Federal rights and remedies. With this knowledge he was content to submit his claim to that board. At no time did the deceased indicate a desire to enforce his Federal rights. In the *Heagney* case (*supra*) it was said at page 978: "If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to any one with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer."

That language is equally applicable here. When the acts of the decedent and the employer are viewed in the light of what reasonably intelligent persons would naturally have intended by them, we think the inference, fairly to be drawn, is that both the employer and employee intended that the board's determinations be taken "in substitution of the litigation permitted by the Federal Acts." That being true, we can conceive of no sound reason why the employer should be permitted to urge his Federal rights at this late date.

The *Fitzgerald* case (*supra*) is not to the contrary. It is essential to note that in that case (1) the employee asserted his lack of intention of waiving his Federal rights, (2) the employer in its answer declared that in making payments it had acted under mistake of fact and law and asked for repayment, and (3) there was no evidence that

the carrier supplied the moneys with which the provisional awards were paid. Certainly those being the facts it could not be held that all of the parties had waived or agreed to forego their Federal rights and remedies. Here (1) the employee has indicated his willingness to forego his Federal rights and remedies, (2) the employer has not asked for repayment of the awards on the ground that it acted under mistake of fact and law in paying them and there is no question about the agreement of an insurance carrier since the employer is self-insured.

The *Newham* and *Doey* cases (*supra*) decided prior to the enactment of the addition to section 113, which held that the lack of jurisdiction in the board had not been waived, are distinguishable. In neither of those cases could it be said that the facts established that the parties with full knowledge of their Federal rights jointly waived or agreed to relinquish them and resort to compensation as a substitute for litigation and since then the statute has been amended.

The order of the Appellate Division should be affirmed, with costs.

FULD, *J.* (dissenting).

The self-insured employer herein, South Buffalo Railway Company, contests the jurisdiction of the Workmen's Compensation Board to make an award of compensation for the benefit of the injured employee, on the ground that at the time of the accident the employee was a railroad worker engaged in duties directly affecting interstate commerce, and that the exclusive remedy for any injuries sustained by him was an action under the Federal Employers' Liability Act (Act; § 1; U. S. Code, tit. 45, § 51). The employer was denied an opportunity before the Board to present evidence in support of its jurisdictional objection, and the issue on this appeal is the validity of that objection on the facts asserted by the employer.

If the Railway Company had challenged the jurisdiction of the Board prior to the making of any award, that challenge, it is indisputable, would have been sustained, since, on the facts posited, the Federal Employers' Liability Act

provides the exclusive remedy. The Board's jurisdiction in this case is being upheld by this court solely because of the fact that three prior temporary awards of compensation were made by the Board and paid by the employer without any jurisdictional objection being raised and that the employer continued to make payments of compensation—without the compulsion of any award—at the rate previously awarded until shortly before the hearing at which the final award of disability compensation now challenged was made. The employee died about two weeks after the employer ceased making payments.[1]

On the strength of the employer's acquiescence in, and payment of, the three temporary awards, and its continuation of payments subsequent to the third temporary award, the Workmen's Compensation Board made a finding of fact that the employer had "waived" its jurisdiction objection and was further precluded from asserting such objection by reason of laches and estoppel. The Appellate Division similarly relied on the doctrines of waiver, laches and estoppel in affirming the Board's determination.

It is not entirely clear whether the decision of this court is predicated on the theory of waiver or on the view that the facts establish a binding executory accord between the parties. Whichever be the basis of the decision, I am constrained to dissent.

We all agree that Congress, by enacting the Federal Employers' Liability Act, pre-empted the field of liability for injuries to railroad employees whose duties are in furtherance of, or "directly" or "closely * * * affect" interstate commerce, to the exclusion of regulation by the states. (See *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 152, 153; *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170, 172; *Matter of Baird* v. *New York Central R. R. Co.*, 299 N.Y. 213, 215, 216; *Matter of Wright* v. *New York Central R. R. Co.*, 288 N.Y. 719, certiorari denied 317 U.S. 668.)

[1] This appeal does not involve any claim for death benefits, though I note that the employer did announce that it would contest the Board's jurisdiction to entertain such a claim if any were filed by the employee's widow. And I also note that the employer does not seek the return of any payments already made.

If the duties of the injured employee in this case were in furtherance of interstate commerce or directly or closely affected it, then obviously the state agency had no jurisdiction on the subject matter of his claim. (See *Matter of Baird* v. *New York Central R. R. Co., supra,* 299 N.Y. 213, 216; *Matter of Newham* v. *Chile Exploration Co.,* 232 N.Y. 37, 42; *Matter of Doey* v. *Howland Co.,* 224 N.Y. 30, 38, certiorari denied 248 U.S. 574.)

We are all further agreed upon the fundamental principle that a determination made by a tribunal that is without jurisdiction of the subject matter is a nullity, and that the lack of jurisdiction cannot be waived or overcome by the consent or agreement of the parties. (*See Matter of Doey* v. *Howland Co., supra,* 224 N.Y. 30, 39; *Matter of Newham* v. *Chile Exploration Co., supra,* 232 N.Y. 37, 42; cf. *Mitchell* v. *Maurer,* 293 U.S. 237, 244; *United States* v. *Corrick,* 298 U.S. 435, 440.) In such circumstances, this court has held, "it is elementary that no agreement, waiver or stipulation could confer upon the state of New York or its courts or commissions, jurisdiction which it does not and cannot possess." (*Matter of Newham* v. *Chile Exploration Co., supra,* 232 N.Y. 37, 42.)

The court, however, reaches the result it does herein in reliance upon an amendment to section 113 of the Workmen's Compensation Law enacted in 1922, subsequent to the *Doey and Newham* decisions (*supra*), authorizing awards to be made by the Workmen's Compensation Board of this state "in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier *waive* their admiralty or interstate commerce rights and remedies". The constitutionality of this statutory provision has, strangely enough, never been passed upon by this court.

In *Fitzgerald* v. *Harbor Lighterage Co.* (244 N.Y. 132), the only case in which we have heretofore had occasion to consider the amended statute, we found it "unnecessary to determine whether waiver in accordance with this section [§ 113] would supersede the remedy in admiralty", since we concluded that the facts did not establish a "waiver" of the kind required by the statute (244 N.Y., p. 136).

Considered purely as a matter of "waiver", I am unable to see how the mere declaration by the state legislature that the parties may "waive" the state's lack of jurisdiction of the subject matter, can have any added force, when the acts of the parties, relied upon as constituting the waiver, would, in the absence of the statutory declaration, be entirely ineffectual to confer jurisdiction. If the state is excluded from the particular sphere of action, it follows that the state is powerless by its own fiat to confer jurisdiction on itself or on its tribunals.

The parties may, of course, enter into a valid agreement for a release or a compromise or an accord and satisfaction of the employee's claims under the Federal Employers' Liability Act. The binding effect of such an agreement would ordinarily be determined by our local law of contracts. The state would undoubtedly have power to legislate with respect to the requisites and binding effect of such an agreement, as it has, for example, done in the case of executory accords generally (Personal Property Law, §§ 33-a, 33-b). It is, however, clear that the facts in this case do not suffice to establish either a release or a compromise or an accord or satisfaction effectual under our common law of contracts or under section 33-a of the Personal Property Law.

The court is apparently interpreting section 113 as giving binding effect, as an executory accord, to an express or even implied agreement by the parties to accept any award that might thereafter be made by the state tribunal in lieu of a determination of the employee's claim in accordance with the federal statute. I cannot subscribe to such a strained reading of the language of that section, which speaks, and unequivocally, only in terms of "waiver", and which, indeed, has already been construed by this court as a statute relating to "waiver". (See *Fitzgerald* v. *Harbor Lighterage Co., supra*, 244 N.Y. 132, 136-137.) Moreover, the effect of such an interpretation is so far-reaching as to permit any express or implied agreement between the parties to submit to the jurisdiction of the Board to serve as a device for circumventing the jurisdictional limitations on the powers of the state and its tribunals.

If we put aside section 113, it is plain that under our settled course of decision nothing short of an actual accord and satisfaction, evidenced either by express agreement of the parties or by the payment by the employer or insurance carrier, and the acceptance by the employee, of a *final* award of the Workmen's Compensation Board would operate to extinguish the employee's claims under the federal statute and thereby supplant the federal remedy. (See, e.g., *Brassel* v. *Electric Welding Co.*, 239 N. Y. 78.) Thus, we have squarely held that the "acceptance of an award *not final* is at most an accord, and not a satisfaction, with the result that the cause of action for damages continues unextinguished, though subject to a set-off to the extent of partial payments". (*Fitzgerald* v. *Harbor Lighterage Co.*, *supra*, 244 N.Y. 132, 135; see, also, *Larsey* v. *Hogan & Sons*, 239 N.Y. 298.)

Whether or not any special significance is to be assigned to section 113 in this regard, *Fitzgerald* v. *Harbor Lighterage Co.* (*supra*, 244 N.Y. 132) impresses me as decisive of the issue now presented. That case involved a stevedore who, injured while working on a vessel in navigable waters, filed a claim for disability compensation with the state compensation tribunal. Two awards were made and paid, covering a period of almost a year, and the case was then placed on the "final adjustment calendar". Before a final award was made, the employee commenced a suit for damages under the federal act. The court, in an opinion written by Judge Cardozo, held that, since no final award had been made, the acceptance of the temporary awards constituted "at most an accord, and not a satisfaction," with the result that the employee's claim under the federal act was not extinguished as a matter of contract law, and that there was likewise no sufficient basis for a finding of a waiver within section 113, even if that section were valid.

Section 33-a of the Personal Property Law, enacted in 1937 (L. 1937, ch. 77), subsequent to the *Fitzgerald* decision (*supra*), gives effect to an executory accord "to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage

or other security interest in personal or real property," "*provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent.*" (Emphasis supplied.) Broad as its provisions are, however, that section is plainly not applicable in the present case, since there is no promise in writing signed by either of the parties involved, or by an agent, agreeing that payment of any award to be made by the Board shall be in satisfaction or discharge of the employee's claims under the federal act.

In enacting section 33-a, the legislature altered the law with respect to executory accords only to the extent that such an accord will be recognized as valid if embodied in a writing signed by the party against whom it is sought to be enforced, or his agent. Notwithstanding that explicit restriction, the court is apparently effecting an extension of the law beyond the limitations deliberately fixed by the legislature. If such a further change in the law is deemed desirable, the remedy lies with the legislature. Certainly, no basis is to be found in section 113 of the Workmen's Compensation Law for imputing to the legislature an intention to extend the pertinent rule in this regard in the field of compensation claims by employees subject to the Federal Employers' Liability Act.

Moreover, the court's decision seems necessarily to be grounded on an implied finding as to the existence of an agreement between the parties in the nature of a binding executory accord. Even assuming that the court has the power—which I very much doubt (cf. *Murray Co.* v. *Lidgerwood Mfg. Co.*, 241 N.Y. 455, 458; *Shohfi* v. *Shohfi*, 303 N.Y. 370; *Matter of McGrinder* v. *Sullivan*, 290 N.Y. 11; Cohen and Karger, Powers of the New York Court of Appeals [1952], pp. 496-497)—to imply such a finding, when the Board, which alone has jurisdiction to pass upon any issue of fact in proceedings before it, did not make any such finding, but based its decision solely on a finding of waiver, laches and estoppel on the part of the employer, the decision in essence means that the almost invariable consequence of acceptance and payment of a temporary award is that the court will thereupon imply an agree-

ment to supplant the federal with the state remedy. All the factors which are stressed in the majority opinion as predicates for implying such an agreement in this case are in essence to be found in almost any case in which one or more temporary awards of compensation have been paid and accepted. In other words, the mere fact that even one temporary award has been paid and accepted without protest is apparently now to be invested with the force of a binding commitment by the parties to submit themselves to the aegis of a tribunal completely without jurisdiction in contravention of the settled principle that neither waiver nor the consent or agreement of the parties can serve to confer jurisdiction where none exists.

I go further. Even if section 113 were to be given full effect in this case, the facts do not establish the requisite elements of the "waiver" envisaged by that section.

In *Fitzgerald* v. *Harbor Lighterage Co.* (*supra*, 244 N.Y. 132), as noted above, though the employee accepted payments under two temporary compensation awards covering a period of almost a year, and though no jurisdictional objection was voiced by any of the parties at the time of the making of such awards, this court held that section 113, even if valid, did not operate to extinguish the employee's right of action under the federal act, since "the waiver which it contemplates has never been announced." Thus, the court (per Cardozo, J.), declared (pp. 136-137): "Claimant, employer and insurance carrier must unite in foregoing their admiralty remedies before the statute will be operative, if its validity be assumed. * * * We put aside the question whether waiver by the claimant within the meaning of this section is sufficiently established by the election to file a claim, unaccompanied by express disclaimer of admiralty remedies. Even if this be assumed, the defendant is not helped unless employer and insurance carrier by some definitive expression have renounced *their* remedies as well. We see no basis for a finding that renunciation was effective when this action was begun. The employer had paid provisional or interlocutory awards for temporary disability. It may have been moved to this course by charity or by indifference or by dislike of litiga-

tion. Its acquiesence would not have barred it from appearing at the final hearing and contesting the claim for any sufficient cause including lack of jurisdiction. * * * In the setting of the context, it [§ 113] imports a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another. Until that intention is announced by all who must participate, a waiver by any one of them is inchoate and revocable."

The mere payment and acceptance of temporary awards can no more be given the effect of a "renunciation" of the federal remedy herein, than they were in the Fitzgerald case (*supra*), notwithstanding the longer period covered by the payments in this case. The court's opinion in *Fitzgerald* cannot be read as assigning controlling importance to any one of the factors urged by Judge Conway (*supra*, pp. 553-554), and to distinguish that case on the grounds suggested is to ignore its basic rationale that the mere payment of temporary awards, amounting to "acquiescence", does not constitute a waiver or a renunciation by the employer of the right to challenge the unauthorized assumption of jurisdiction by the Board.

The order of the Appellate Division and the decision of the Workmen's Compensation Board should be reversed and the proceeding remitted to the Board for consideration of the objections raised by the employer to the Board's jurisdiction over the subject matter of this claim.

Loughran, *Ch. J.*, Lewis, Desmond, Dye and Froessel, *JJ.*, concur with Conway, *J.*; Fuld, *J.*, dissents in opinion.

Order affirmed.

APPENDIX B

Memorandum Decision of Appellate Division, Third Department, New York Supreme Court

(277 App. Div. 1067 (1950))

This is an appeal by a self-insured employer from a decision of the Workmen's Compensation Board which denied

the employer's application for a review and a rehearing of a referee's decision and award allowing disability compensation to the widow of Thomas J. Ahern, the deceased employee. It is conceded that decedent was employed as a switchman by the appellant at Lackawanna, New York. On July 1, 1944, while engaged in the regular course of his employment and while attempting to throw a switch, the switch stuck and the employee was compelled to use extra exertion, strain and effort, by reason of which he suffered an acute coronary occlusion, with resultant disability. He filed a claim for compensation benefits on January 15, 1945. The employer controverted the claim solely on the issues of accident and causal relation. On September 24, 1945, an award was made in favor of decedent on these issues and the board on November 15, 1945, affirmed the referee's decision and denied the application for review. No appeal was taken by the employer from these decisions and the awards. The appellant paid compensation without any objection until December 20, 1948. On January 3, 1949, the employee died, as a result of a heart condition. On January 18, 1949, a hearing was held before the referee. The question then arose as to the widow's right to an award for disability compensation at the time of her husband's death. At this hearing the appellant, for the first time, objected to the disability claim on the ground of jurisdiction. The referee made an award for disability compensation due to the decedent between February 4, 1947, and January 3, 1949, the date of his death. That award is the subject of this appeal. The board found that the appellant had waived its right to raise the issues of jurisdiction and interstate commerce by reason of gross laches and conduct prejudicial to the decedent's widow. We think appellant had waived its right to question the jurisdiction of the Workmen's Compensation Board in this case. (*Matter of Haglund* v. *Morse Dry Dock & Repair Co.*, 255 App. Div. 895.) Award unanimously affirmed, with costs to the Workmen's Compensation Board. Present—Foster, *P. J.*; Heffernan, Brewster, Deyo and Bergan, *JJ.*

APPENDIX C

Memorandum Decision of New York State Workmen's Compensation Board

On January 26, 1949, an award was made in the above captioned disability case from February 4, 1947, to January 3, 1949, at $28 and the case was continued for preparation of a death claim.

The self-insured employer objects to the award and asks for review, contending that the Board is without jurisdiction since the deceased claimant was employed in interstate commerce and "that this case comes within the terms of the Federal Employer's Liability Act if any cause of action exists at all * * *."

On July 1, 1944, claimant suffered an acute coronary occlusion while employed at the South Buffalo Railway Yards. The employer, in a C-7 notice of controversy filed on February 9, 1945, raised issues of accident and causal relationship. After many hearings and on September 24, 1945, findings of accident and causal relationship were made and claimant awarded compensation for total disability from July 1, 1944, to June 5, 1945. On November 8, 1945, the Board affirmed the findings of the Referee and denied the employer's application for review. The employer thereupon paid the award of September 24, 1945, and has continued to pay compensation up until the time of claimant's death.

The question of jurisdiction is raised now for the first time. The self-insured employer relies on the case of *Fitzgerald* v. *Harbor Lighterage Company*, 244 N. Y. 132, in support of its application for review or rehearing.

The *Fitzgerald* case is authority for the proposition that the filing of a claim, the making of an award and acceptance of compensation does not preclude a claimant from subsequently proceeding under the Maritime Law. In a subsequent decision, *Kane* v. *Morse Dry Dock and Repair Co.*, 277 N. Y. Rep., the Court of Appeals has affirmed a lower court's decision, which cites the *Fitzgerald* case, to the effect that an employer by its conduct may waive and be estopped from raising the question of jurisdiction.

In the opinion of the Board, the self-insured employer herein has been guilty of laches and has, by its conduct and the effect thereof on the rights of deceased claimant or those entitled to take benefits due or that may become due as a result of the accident of July 1, 1944, waived its right to question the jurisdiction of the Workmen's Compensation Law.

The self-insured employer's application for review or rehearing is therefore denied.

Dated: April 21, 1949.

APPENDIX D

Pertinent Provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended, Act of Aug. 11, 1939, c. 685, 53 Stat. 1404, 45 U.S.C. §§ 51, et seq.)

Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or

foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended.

. . .

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 179

SOUTH BUFFALO RAILWAY COMPANY,
Appellant,

v.

GERTRUDE SLOAN AHERN and NEW YORK STATE WORKMEN'S COMPENSATION BOARD,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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November 24, 1952.

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IN THE

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SOUTH BUFFALO RAILWAY COMPANY,
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Appellees.

No. 179

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

OPINIONS BELOW

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (R. 95), has been reported in 277 App. Div. 1067 (1950). The opinion of the Court of Appeals of the State of New York (R. 98) has been reported in 303 N. Y. 545 (1952).

JURISDICTION

The final judgment of the Court of Appeals of the State of New York, a review of which is here sought, was entered in the office of the Clerk of said Court on March 13, 1952 (R. 97). The petition for appeal was presented and the appeal was allowed on June 5, 1952 (R. 125).

The jurisdiction of this Court rests upon the provisions of Section 1257(2) of Title 28, United States Code (Supp. V).

The opinion of the Court of Appeals of the State of New York (R. 98) shows that the validity of a state statute, namely, Section 113 of the New York State Workmen's Compensation Law, was drawn into question in that Court as being repugnant to the Constitution and laws of the United States (particularly the Federal Employers' Liability Act) and that the decision of the Court of Appeals was in favor of the validity of such Section.

As appears from the Record in this case (R. 5, 8, 9, 26, 27, 88-91, 95) and the opinion of the Court of Appeals of the State of New York (R. 98), the appellant has contended before the New York State Workmen's Compensation Board (hereinafter called the Board) and throughout the courts of the State of New York that, because of the exclusive provisions of the Federal Employers' Liability Act, the Board did not have any jurisdiction over the subject-matter of this proceeding and that the right of the appellant to question the jurisdiction of the Board had not been waived.

STATUTES INVOLVED

The statute of the State of New York the validity of which is involved is Section 113 of the New York State Workmen's Compensation Law (64 McKinney's Consolidated Laws of New York (1946) § 113), which is as follows:

> "§ 113. **Interstate commerce.** The provisions of this chapter [that is, the New York State Work-

men's Compensation Law] shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

The pertinent provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65; as amended by the Act of Aug. 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. §§ 51 *et seq.*) are as follows:

"SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.

"

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued.

"

STATEMENT

This proceeding involves the validity of an award of disability compensation which was made by a Referee of the Board on January 26, 1949, under the provisions of the New York State Workmen's Compensation Law against the appellant, a common carrier by railroad engaged in interstate commerce (R. 21). The Board denied the application of the appellant for review or rehearing of that award and held that the appellant had waived its right to question the jurisdiction of the Board (R. 7-9). The decision of the Board was affirmed on appeal by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (R. 95), and by the Court of Appeals of the State of New York (R. 98).

On January 15, 1945, Thomas J. Ahern (the deceased husband of appellee Gertrude Sloan Ahern), who had been employed as a brakeman by the appellant, filed a claim for disability compensation with the Board under the provisions of the New York State Workmen's Compensation Law (R. 28). Such claim was predicated upon a coronary occlusion which Ahern allegedly suffered on July 1, 1944, when he threw a switch on the railroad of the appellant (R. 29). In accordance with Board procedure, the appellant filed with the Board a notice of controversy dated February 1, 1945, in which the appellant first controverted the claim on grounds of accident and causal relation, and expressly reserved the right to controvert it for such other reasons as might later appear (R. 33). After hearings before a Referee of the Board at which evidence was adduced on the issues of accident and causal relation (R. 35-83), an award was made in favor of Ahern on September 24, 1945, for dis-

ability compensation in respect of temporary total disability for the 48-2/6 weeks from July 1, 1944, to June 5, 1945, at the rate of $28 per week, and the case was continued for consideration of the extent and length of disability subsequent to June 5, 1945, and "all other issues" (R. 12).

On October 11, 1945, the appellant filed with the Board an application for review of the decision that Ahern suffered an accidental injury arising out of and in the course of his employment (R. 24). That application was denied by the Board on November 15, 1945 (R. 16). Thereafter, two additional interlocutory awards of disability compensation were made by a Referee of the Board, one on January 10, 1946, for the 31 weeks from June 5, 1945, to January 8, 1946 (R. 19), and the other on February 5, 1947, for the 56 weeks from January 8, 1946, to February 4, 1947 (R. 20).

At a hearing before a Referee of the Board on January 18, 1949, with reference to a final award of disability compensation (Ahern having died on January 3, 1949), the appellant challenged the jurisdiction of the Board and offered proof on that issue (R. 88-89, 91). The Referee ruled, however, that the appellant could not controvert the claim on the ground that the Board did not have any jurisdiction of it; that "once having taken jurisdiction in the matter, we continue jurisdiction"; and that thereafter the question of jurisdiction "is *res adjudicata*" (R. 89).

On January 26, 1949, the Referee made an award of disability compensation for two periods, one for the 97-5/6 weeks from February 4, 1947, to December 20, 1948, and the other for the two weeks from December 20, 1948, to January 3, 1949 (R. 21). In accordance with the previous award of February 5, 1947 (R. 20), the appellant had con-

tinued to make periodic payments of compensation to Ahern at the prescribed rate until December 20, 1948, so that only $56 remains to be paid (R. 6, 90, 101).

On or about February 15, 1949, the appellant filed with the Board an application for review or rehearing of the decision and award of the Referee on the ground that at the time of the alleged accident Ahern was employed by the appellant in interstate commerce; that on that account the case came within the provisions of the Federal Employers' Liability Act; and that, therefore, the Board was without jurisdiction of the claim (R. 26). The undisputed fact before the Board on such application showed that Ahern was employed by the appellant "in the movement of railroad cars in interstate commerce" (R. 27-28).

On May 2, 1949, the Board denied the application of the appellant (R. 7) and ruled that in its opinion (stated in its Memorandum of Decision dated April 21, 1949) the appellant had been "guilty of laches" and by its conduct had "waived its right to question the jurisdiction of the Workmen's Compensation Law" (R. 8-9). Hence, the Board refused to consider evidence that Ahern and the appellant were engaged in interstate commerce at the time of the alleged accident and refused to review the rulings of the Referee (R. 8-9).

On appeal, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held in a brief memorandum decision (R. 95) that the appellant had waived its right to question the jurisdiction of the Board.

On the ground that the construction of the Constitution of the United States was directly involved, the appellant appealed as of right to the Court of Appeals of the State

of New York under the provisions of Section 588(1)(a) of the New York Civil Practice Act (R. 92, 98).

On March 13, 1952, the Court of Appeals (one judge dissenting) affirmed the order of the Appellate Division (R. 97). In its opinion (R. 98) the Court of Appeals held that Section 113 of the New York State Workmen's Compensation Law was not repugnant to the Constitution and laws of the United States (particularly the Federal Employers' Liability Act) and that, even though there was not an express agreement between the parties settling their dispute, the acts of the parties showed that they "intended that the board's determinations be taken 'in substitution of the litigation permitted by the Federal Acts'" (R. 114). In other words, the Court held that the parties had waived their Federal rights and remedies in accordance with the provisions of Section 113 of the New York State Workmen's Compensation Law and that, therefore, the appellant was precluded from raising the question of the lack of jurisdiction of the Board over the subject-matter of the claim.

SPECIFICATION OF ERRORS

The Court of Appeals of the State of New York erred:

1. In deciding in favor of the validity of Section 113 of the New York State Workmen's Compensation Law as applied in this case, as against contentions of the appellant that the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States and the provisions of the Federal Em-

ployers' Liability Act forbade the application of such Section 113 in this case.

2. In holding that the appellant, by making payment of interlocutory awards of disability compensation under the New York State Workmen's Compensation Law, and the employee, by accepting such payments, entered into an agreement of waiver under Section 113 of such Law, which was valid as a settlement or compromise of a cause of action for personal injury under the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT

I

The appellant contends that Section 113 of the New York State Workmen's Compensation Law, as applied by the Court of Appeals in this case, is in irreconcilable conflict with the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States and with the Federal Employers' Liability Act. If the construction which the Court of Appeals has given to Section 113 should be allowed to stand, it would permit the Board to assume jurisdiction over claims arising out of the injuries to employees of carriers by railroad sustained while both were engaged in interstate commerce. The field of liability in such cases has been pre-empted by the Congress by enacting the Federal Employers' Liability Act. The exclusive character of that Act derives from the provisions of the Constitution of the United States, Article I, Section 8, Clauses 3 and 18, and Article VI, Clause 2.

The purpose of the Congress in enacting the Federal Employers' Liability Act was to prescribe a uniform rule in respect of the liability of carriers by railroad for injuries to their employees while engaged in interstate commerce. In this case, however, the Court of Appeals, applying Section 113, has required the appellant to submit to the jurisdiction of a statutory tribunal of the State of New York and, in so doing, has permitted the State to interfere with the uniform application of that Act which the Congress intended.

II

The appellant contends that the finding by the Court of Appeals of an accord and satisfaction and release of a cause of action under the Federal Employers' Liability Act cannot be supported in law. Admittedly, a cause of action under the Federal Employers' Liability Act may be settled by an accord and satisfaction or by a release, but the facts from which the Court of Appeals has implied a settlement "agreement" amounting to such an accord and satisfaction or release in this case fall far short of the standards required by this Court for finding a valid agreement of that kind.

The validity of a satisfaction and release of a cause of action under the Federal Employers' Liability Act raises a Federal question to be determined by Federal law. The Congress could not have intended that such a cause of action should be settled by submission to a State workmen's compensation tribunal, because thereby the uniform application of Federal law would be interfered with.

ARGUMENT

POINT I

SECTION 113 OF THE NEW YORK STATE WORKMEN'S COMPENSATION LAW, AS APPLIED BY THE COURT OF APPEALS IN THIS CASE, IS IN IRRECONCILABLE CONFLICT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION AND WITH THE FEDERAL EMPLOYERS' LIABILITY ACT.

A. Section 113, as Construed by the Court of Appeals in This Case, Would Permit the Board to Assume Jurisdiction over the Subject-Matter of a Claim Which Is Subject to the Exclusive Provisions of the Federal Employers' Liability Act.

The predecessor of Section 113 was enacted in 1913 as Section 114 of the New York State Workmen's Compensation Law (New York Laws of 1913, c. 816, as amended and re-enacted by New York Laws of 1914, c. 41) and was as follows:

> "§ 114. **Interstate commerce.** The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the [workmen's compensation] commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like

> manner and with the same effect in all respects as provided herein for other employers and their employees."

Effective July 1, 1922 (New York Laws of 1922, c. 615), and subsequent to the decisions of this Court in *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), and *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), both of which involved Section 114 as quoted above, Section 114 was renumbered Section 113 and amended by substituting for the latter part of Section 114 as so renumbered, beginning with the word "except", the following proviso:

> "provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

That amendment was adopted by the New York State Legislature in the form proposed by a joint committee appointed by it to recodify and revise the Workmen's Compensation Law, pertinent extracts from the report of which are set forth in Appendix A. Such report (*post*, p. 28) shows that the committee was primarily concerned with the confused jurisdictional situation which prevailed with respect to maritime and longshore work following the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), *supra*, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920). Section 113 nevertheless is by

its terms applicable to injuries to employees of carriers by railroad while engaged in interstate commerce and authorizes the Board to assume jurisdiction and make awards in cases where the employer and the employee (and the insurance carrier, if any) "waive" their interstate commerce rights and remedies.

The Court of Appeals in this case has gone far beyond the express language of Section 113 and the intent of the New York Legislature in enacting it. It is not denied that the claim involved in this case is one for personal injury which is subject to the Federal Employers' Liability Act. Nevertheless, the Court of Appeals has held that Section 113 authorized the Board to take jurisdiction of such claim, if the parties agreed thereto, and that an agreement that the Board should have jurisdiction of the claim is to be implied or presumed from the payment and acceptance of three interlocutory awards of disability compensation and a continuance of payments in accordance with the third such award.

B. Section 113, as Constructed in This Case, Interferes with the Uniform Application of the Federal Employers' Liability Act and Compels Submission of a Claim Thereunder to the Jurisdiction of a State Board in a Manner Proscribed by the Congress.

The Court of Appeals in its opinion in this case purported to recognize the exclusiveness of the Federal Employers' Liability Act, saying that the State of New York "is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce" (R. 102). It nevertheless did in effect permit the State of New York to invade that field by holding that the parties through

their acts had waived their interstate commerce rights and remedies (that is, the rights and remedies established by the Federal Employers' Liability Act) and that, therefore, the Board, under the provisions of Section 113 of the New York State Workmen's Compensation Law, had jurisdiction to make the award in question.

The Congress, by enacting the Federal Employers' Liability Act, provided a proper and eminently desirable solution of the then vexing and confused problem which had arisen out of the application of widely divergent State laws to interstate carriers by railroad and established a uniform rule prescribing the liability of such carriers to their employees on account of personal injuries sustained while they were engaged in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1 (1912); *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), *supra; Erie R. R. Co.* v. *Winfield*, 244 U. S. 170 (1917). This Court has consistently recognized the soundness of that principle and has insisted upon its uniform application. *Brown* v. *Western R. of Alabama*, 338 U. S. 294 (1949); *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952).

As stated by this Court in the *Second Employers' Liability Cases* (223 U. S. at 51):

> "We are not unmindful that that end [the avoidance or prevention of negligence] was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. . . ."

It is settled beyond question that the liabilities and obligations of railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated by the Federal Employers' Liability Act and that, the Congress having thus fully covered the subject, State regulation is thereby prohibited, even in respect of injuries occurring without the fault of the employer. The exclusive character of that Act derives from the provisions of the Constitution of the United States, Article I, Section 8, Clauses 3 and 18, and Article VI, Clause 2. *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), *supra*.

In that case the accident occurred without negligence of the carrier. The injured employee sought compensation for his injury under the New York Workmen's Compensation Law, and an award was made to him by the State Commission. On appeal the award was affirmed by the Appelkate Division of the Supreme Court and by the New York Court of Appeals. This Court, however, held that such award could not be sustained and, in so doing, emphasized the requirement of uniformity in such cases. As showing what the Congress intended, and, therefore, what the Act does, this Court quoted from the House report recommending enactment of the bill which became the Federal Employers' Liability Act, H. R. Rep. No. 1386, 60th Cong., 1st Sess. (1907), as follows (244 U. S. at 150):

> "'It is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant

> the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.' "

This Court accordingly held that a State was not at liberty to disturb the uniformity which the Federal Employers' Liability Act was designed to effect and to interfere with its operation and, in so doing, said (244 U. S. at 153):

> "Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. . . ."

It is also settled beyond question that a State may not compel submission to the jurisdiction of a State workmen's compensation tribunal in respect of an injury to a railroad employee while engaged in interstate commerce. *Erie R. R. Co. v. Winfield,* 244 U. S. 170 (1917), *supra.* In its opinion (R. 108) the Court of Appeals attempted to distinguish this case from the decision of this Court in the *Erie* case, wherein application of the New Jersey workmen's compensation statute was sought. There is not, however, any valid difference in effect between that statute and Section 113, as construed and applied by the Court of Appeals in this case.

That statute (New Jersey Laws of 1911, c. 95) consists of two sections. Section I dealt with liability founded upon

negligence, and Section II with liability in the absence of negligence. Section II, in pertinent part, is as follows:

"7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases [with certain exceptions not here pertinent].

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

"9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

> "10. The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing prior to any accident."

In the *Erie* case, this Court again held that the Federal Employers' Liability Act "establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive" (244 U. S. at 172) and, accordingly, that the New Jersey courts had failed to give controlling effect to the provisions of that Act. In so doing, this Court said (244 U. S. at 173-74):

> ". . . There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption. . . ."

By enacting Section 113, in total disregard of the intention of the Congress that the Federal Employers' Liability Act should establish a uniform rule of liability throughout the States, the New York Legislature has attempted not only to confer upon its Workmen's Compensation Board the

power to deal with claims for personal injuries of employees while engaged in interstate commerce, but also to provide compensation for such injuries in cases in which, as shown by the *Erie* case, liability was not intended by the Congress. By its decision in this case the Court of Appeals has attempted to give effect to Section 113 of the New York Workmen's Compensation Law just as the New Jersey courts attempted to give effect to the New Jersey statute which is quoted above. In this case, the Court of Appeals has decided not only that an agreement of waiver described in Section 113 is effective, but also that a binding settlement "agreement" may be implied or presumed from the payment and acceptance of interlocutory awards of disability compensation. From the "agreement" so implied or presumed, that Court has held that the parties elected to be bound by the provisions of the New York State Workmen's Compensation Law and have waived any rights and remedies under the Federal Employers' Liability Act.

It is important to note that, in enacting their workmen's compensation laws, all the States, except six (possibly three others),* have respected the will of the Congress and have meticulously included provisions exempting from the application of those laws claims for personal injuries of employees when engaged in interstate commerce. In Appendix B hereto the relevant provisions, if any, of the workmen's compensation laws of the States other than New York are cited.

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*The six States are New York, with which we are herein dealing, and Illinois, New Jersey, Pennsylvania, Rhode Island and Wisconsin, whose laws do not contain any provision with reference to jurisdiction of claims of employees engaged in interstate commerce. The other three are Kentucky, Maryland and Michigan, whose laws are not clear on the point.

It is obvious that Section 113 as the Court of Appeals has applied it in this case has the effect of conferring jurisdiction on the Board and that that Section as so applied may be used as a ready vehicle for circumventing the jurisdictional limitations upon the State of New York and its statutory tribunals which, as shown above, are prescribed by the Constitution and laws of the United States. Under the decision of the Court of Appeals in this case the mere payment and acceptance of a single interlocutory award of workmen's compensation may be construed to have the force of a binding agreement by the parties to submit themselves to a tribunal which is completely without jurisdiction and whose rule of liability is totally at variance with the uniform rule of liability which the Congress by enacting the Federal Employers' Liability Act has established for carriers by railroad.

The dangers which are pointed out above were clearly expressed by Judge Fuld in his dissenting opinion in the Court of Appeals in this case, as follows (R. 120-21):

> ". . . All the factors which are stressed in the majority opinion as predicates for implying such an agreement in this case are in essence to be found in almost any case in which one or more temporary awards of compensation have been paid and accepted. In other words, the mere fact that even one temporary award has been paid and accepted without protest is apparently now to be invested with the force of a binding commitment by the parties to submit themselves to the aegis of a tribunal completely without jurisdiction in contravention of the settled principle that neither waiver nor the consent or agreement of the parties can serve to confer jurisdiction where none exists."

It is fundamental that a determination which is made by a tribunal that is without jurisdiction of the subject-matter is a nullity and that the lack of jurisdiction may not be waived or overcome by the consent or agreement of the parties. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934); *United States* v. *Corrick*, 298 U. S. 435, 440 (1936). The lack of jurisdiction in this case derives from the controlling provisions of a Federal law. Since the jurisdiction of the State of New York over the subject-matter of this case is thereby excluded, it follows that the State is powerless by its own fiat to confer jurisdiction on its tribunals as it has sought to do through the vehicle of Section 113 as construed and applied in this case.

POINT II

PRINCIPLES OF ACCORD AND SATISFACTION AND RELEASE OF A CAUSE OF ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT WHICH WERE APPLIED BY THE COURT OF APPEALS IN THIS CASE ARE NOT APPLICABLE.

The Court of Appeals, in construing Section 113 as it has in this case, has incorrectly applied the decisions of this Court with respect to the settlement and compromise of actions for personal injury under the Federal Employers' Liability Act. *Duncan* v. *Thompson*, 315 U. S. 1 (1942); *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625 (1948).

In the *Callen* case it was held that Section 5 of the Federal Employers' Liability Act (quoted *supra* at p. 4) does not operate to prevent an otherwise valid release of a claim by an individual engaged in interstate commerce and that "Where controversies exist as to whether there is lia-

bility, and if so for how much, Congress has not said that parties may not settle their claims without litigation" (332 U. S. at 631). And in *Boyd* v. *Grand Trunk W. R., Co.*, 338 U. S. 263, 266 (1949), the agreement in the *Callen* case was characterized as a "full compromise enabling the parties to settle their dispute without litigation." There is a vast and controlling distinction, however, between a full settlement effected in writing by the parties with full regard for their rights under the Federal Employers' Liability Act, such as the settlement which was involved in the *Callen* case, and an implied "agreement" to submit to the jurisdiction of the Board, such as the Court of Appeals has found in this case.

The Court of Appeals in this case held that the payment and acceptance of interlocutory awards made by the Board constituted a settlement "agreement" which was in effect a satisfaction and release of the cause of action for personal injuries under the Federal Employers' Liability Act and that that "agreement" precluded the appellant from raising the question of lack of jurisdiction of the Board over the subject-matter of the claim which is here involved. The court cited as authority for its holding the case of *Heagney* v. *Brooklyn Eastern Dist. Terminal*, 190 F. 2d 976 (2d Cir. 1951), *cert. denied*, 342 U. S. 920 (1952). The facts in that case, however, are very different from the facts in this case, and, even if it be admitted that that case was correctly decided (which the appellant does not admit), it is not authority for the decision of the Court of Appeals in this case.

In the *Heagney* case the plaintiff brought an action in a United States District Court under the provisions of the Federal Employers' Liability Act to recover damages for personal injuries. A few days after the accident in which

the plaintiff was injured and two years prior to the commencement of that action, the plaintiff had signed a statement for the employer describing the accident and saying: "I have no intention of suing my employer but going to take voluntary compensation". Promptly thereafter the employer began to pay compensation at the maximum rate allowed by the New York State Workmen's Compensation Law. When the required papers were filed, a clerk of the Board concluded from such papers that there might be a question of "voluntary compensation", since the defendant in the case was perhaps engaged in interstate commerce. For that reason the carrier was notified of the question, and a hearing was set by the Board. In the notice given to the plaintiff it was stated that the "Purpose of Hearing" was the "Question of Jurisdiction". At the hearing the referee of the Board announced that it concerned the "question of jurisdiction", in response to which the defendant's representative said: "No, we waive that. We are paying the man $28." At the close of such hearing an award of $28 a week was made in favor of the employee. The defendant continued to make payments pursuant to that award for about five months, when it requested another hearing, because it had been informed that the employee was able to work. On that hearing the Board made a finding that payments had been stopped, because "claimant able to work". Thereafter, on further hearing the case was reopened at the request of the employee after he had retained counsel and payments were ordered at $18 a week. Payments pursuant to that award were continued for almost two years, when the plaintiff notified the defendant that he was making a claim under the Federal Employers' Liability Act, and he had the case before the Board closed "without prejudice" (190 F. 2d at 977).

In the action under the Federal Employers' Liability Act the defendant moved for summary judgment dismissing the action on the ground that the plaintiff had waived his Federal remedies. The District Court granted the motion, and the United States Court of Appeals for the Second Circuit affirmed, holding that the plaintiff had waived, under the provisions of Section 113, his Federal rights and remedies and that under those facts Section 113 was valid and binding upon the plaintiff.

As stated above, the *Heagney* case does not support the decision of the Court of Appeals in this case. In that case there was an express agreement to pay and to accept compensation as provided by the Workmen's Compensation Law. Such an agreement cannot be found in this case.

The validity of a satisfaction and release of a cause of action under the Federal Employers' Liability Act raises, of course, a Federal question to be determined by Federal rather than State law, for only if Federal law controls, as it does, can that Act be given the uniform national application essential to effectuate its purposes. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1952), *supra*. It is contrary to established principles of law to hold that the implied "agreement" which the Court of Appeals has found in this case constitutes a valid release of a cause of action under the Federal Employers' Liability Act.

As stated above, the Congress has pre-empted the field of liability, and the States are prohibited from interfering therein. How incongruous it is then to maintain that the Congress in enacting Section 5 of the Federal Employers' Liability Act (which was considered in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625 (1948), *supra*) intended that

causes of action under that Act could be settled by submission to State workmen's compensation tribunals, whose rules of liability are entirely at variance with the uniform rule of liability prescribed by the Congress. See *McCahan Sugar Refining & Molasses Co.* v. *Stoffel,* 41 F. 2d 651 (3d Cir. 1930), an action under the Jones Act (41 Stat. 1007, 46 U. S. C. § 688) in which a release in writing that provided for the acceptance and payment of compensation under the Pennsylvania Workmen's Compensation Act was held to be void because it was opposed to public policy in that it encroached upon the Federal maritime jurisdiction. The court there stated (41 F. 2d at 654):

> "In the case in hand the respondent tried to do what the Supreme Court has said state Legislatures cannot do. The attempt was, pari ratione, equally void. If this contract were otherwise good, it would still be bad because opposed to public policy. But aside from this vital defect, the contract, with the ingrafted release, is void for the three reasons first stated [incomplete, lacked mutuality, duration of payments depended upon another agreement to be approved by the Workmen's Compensation Board]."

A valid satisfaction and release under the Federal Employers' Liability Act presupposes a full settlement "without litigation". *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625, 631 (1948), *supra.* What is involved in this case, however, is not a settlement "without litigation" but, instead, the substitution of the Board for the proper and only forum which is provided by Section 6 of the Federal Employers' Liability Act—a Federal or State trial court with jurisdiction of the parties.

It has been suggested that a release in writing providing for the relinquishment by an injured employee of all his rights of action for personal injuries, in consideration of a fixed schedule of periodic payments such as might be specified in a State workmen's compensation act for the particular injury, would be valid: *Bay State Dredging & Contracting Co. v. Porter*, 153 F. 2d 827, 832-33 (1st Cir. 1946). Such a settlement should not be regarded as sufficient in law. But whether or not that be correct, the facts and circumstances in this case do not come within the scope of that suggestion. Here, the State seeks to impose its Workmen's Compensation Law upon the appellant. Moreover, the question of what payments are to be made and under what conditions is indefinite and subject to the vagaries of litigation before a State compensation tribunal.

CONCLUSION

The judgment below should be reversed and the proceeding should be remanded to the Board for the submission of proof as to the jurisdiction of the Board over the subject-matter of the proceeding, and the appellant respectfully submits that, in so doing, this Court should reaffirm the principles which, as this Court has heretofore held, the Congress intended should be applied in determining under the Federal Employers' Liability Act the liability of carriers for injuries to their employees while they are engaged in interstate commerce and should now eliminate the possibility of diversity of determinations through the application of State laws by holding that the only settlements of claims under that Act which shall be valid are those that

determine all questions of liability and result in a payment or definite provision for the payment of such liability in full.

November 24, 1952.

Respectfully submitted,

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APPENDIX A

Excerpts from the Report of the Joint Legislative Committee to Recodify and Revise the Workmen's Compensation Law (New York Legislative Document (1922) No. 55)

"Your Committee is of the opinion . . .

". . .

"That the insurance carrier, the employer, and the injured employee, or his dependents or representatives, may jointly waive any jurisdictional defect or inhibition of federal statute or constitution, and jointly elect the one to pay the other to receive compensation, under the provisions of the State Law. [p. 9]

". . .

"5. The United States Supreme Court has held that admiralty questions are reserved by the Federal Constitution to the United States courts; that longshoremen are engaged in, and longshore work is, admiralty service; therefore that State courts cannot exercise jurisdiction in such cases.

"But they have not held that, after an accident, all interested parties cannot elect the one to accept the others to pay compensation, in the amounts and manner provided by said statute.

"In this State a large number of the accidents of industry occur in longshore work; at the harbors, wharves, and on the rivers and canals of the State. The longshoremen and canal men generally, the employers as well, the State Fund, and many of the other carriers, are very desirous that effort be made to include such cases under our Compensation Law, so far as it is possible to do so.

"The proposed amendment will permit those who choose to elect to accept the provisions of our law to so elect, and the one to pay the other to accept compensation thereunder." [pp. 11-12]

APPENDIX B

List of State Workmen's Compensation Statutes Relating to the Subject of State Jurisdiction in Respect of Injuries in Interstate Commerce

Alabama

Code of Alabama, 1940 (Cum. Supp. 1951), Title 26, Section 263.

Arizona

Arizona Code, 1939, Title 56, Section 56-965.

Arkansas

Arkansas Statutes Annotated 1947 (Cum. Supp. 1951), Title 81, Section 81-1303.

California

Labor Code (1937), Section 3203.

Colorado

Colorado Statutes Annotated 1935 (1952 edition), Chapter 97, Section 289.

Connecticut

General Statutes of Connecticut, 1949, Title 61, Section 7460.

Delaware

Revised Code of Delaware, 1935, Chapter 175, Section 6119(49).

Florida

Florida Statutes, 1951, Chapter 440, Section 440.09.

Georgia

Georgia Code, 1933, Title 114, Section 114-108.

Idaho

Idaho Code, 1947, Title 72, Section 72-1008.

Illinois

No relevant provision.

Indiana

Indiana Acts of 1929, Chapter 172, Sections 2, 19, as amended by Acts of 1937, Chapter 214 (Burns Indiana Statutes Annotated, 1952, Title 40, Section 40-1219).

Iowa

Code of Iowa, 1950, Chapter 85, Section 57.

Kansas

General Statutes of Kansas, 1949, Chapter 44, Section 44-506.

Kentucky

Kentucky Revised Statutes, 1948, Chapter 342, Section 342.005.

Louisiana

Louisiana Revised Statutes, 1950, Title 23, Section 1037.

Maine

Revised Statutes of Maine, 1944, Chapter 26, Section 2.

Maryland

Annotated Code of Maryland (Flack 1951); Article 101, Sections 30, 31).

Massachusetts

General Laws of Massachusetts (Ter. ed.), Chapter 152, Section 1(4), as amended by Laws of 1945, Chapter 369, and Laws of 1947, Chapter 215 (Annotated Laws of Massachusetts, 1950, Chapter 152, Section 1(4)).

Michigan

Michigan Compiled Laws, 1948, Section 416.4 (Michigan Statutes Annotated, 1951, Title 17, Section 17.215).

Minnesota

Minnesota Statutes 1945, Chapter 176, Section 176.05.

Mississippi.

Mississippi Code, 1942 (Supp. 1950), Title 25, Section 6998-03.

Missouri

Missouri Revised Statutes, 1949, Section 287.110.

Montana

Revised Codes of Montana, 1947, Title 92, Section 92-805.

Nebraska

Revised Statutes of Nebraska, 1943 (Cum. Supp. 1951), Chapter 48, Section 48-106.

Nevada

Nevada Compiled Laws, 1929 (Supp. 1943-49), Section 2680.23.

New Hampshire

Laws of New Hampshire, 1947, Chapter 266, Section 2.

New Jersey

No relevant provision.

New Mexico

New Mexico Statutes, 1941, Title 57, Section 57-911.

North Carolina

General Statutes of North Carolina, 1943 (Recompilation 1950), Chapter 97, Section 97-13.

North Dakota

North Dakota Revised Code of 1943 (Supp. 1949), Title 65, Section 65-0102.

Ohio

Ohio General Code, 1934, Chapter 28b, Section 1465-98 (Page's Ohio General Code Annotated, Chapter 28b, Section 1465-98).

Oklahoma

Oklahoma Statutes, 1951, Title 85, Section 3.

Oregon

Oregon Compiled Laws, 1940, Title 102, Sections 102-1712, 102-1725.

Pennsylvania

No relevant provision.

Rhode Island

No relevant provision.

South Carolina

Code of Laws of South Carolina, 1942, Title 35, Section 7035-16.

South Dakota

South Dakota Code of 1939, Title 64, Section 64.0105.

Tennessee

Tennessee Code Annotated (Williams 1934) (Cum. Supp. 1952), Chapter 43, Section 6856.

Texas

Revised Civil Statutes of Texas, Title 130, Article 8306, Section 2.

Utah

Utah Code Annotated, 1943, Title 42, Section 42-1-89.

Vermont

Vermont Statutes, 1947, Title 40, Section 8075.

Virginia

Code of Virginia, 1950, Title 65, Sections 65-24, 65-25.

Washington

Revised Code of Washington, 1950, Title 51, Section 51.12.080.

West Virginia

West Virginia Code of 1949, Chapter 23, Section 2520.

Wisconsin

No relevant provision.

Wyoming

Wyoming Laws of 1951, Chapter 143, Section 16.

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OCTOBER TERM, 1952

No. 179

SOUTH BUFFALO RAILWAY COMPANY,
Appellant,

v.

GERTRUDE SLOAN AHERN and NEW YORK STATE WORKMEN'S COMPENSATION BOARD,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE NEW YORK STATE WORKMEN'S COMPENSATION BOARD

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 179

SOUTH BUFFALO RAILWAY COMPANY,

Appellant,

v.

GERTRUDE SLOAN AHERN, and NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE NEW YORK STATE WORKMEN'S COMPENSATION BOARD

Opinions Below

The opinion of the Court of Appeals of the State of New York (R. 98) has been reported in 303 N. Y. 545 (1952).

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department (R. 95), has been reported in 277 App. Div. 1067 (1950).

Jurisdiction

Probable jurisdiction was noted in the instant case on October 13, 1952.

Statutes Involved

The appellant challenges the validity of the application to this case of Section 113 of the Workmen's Compensation Law of the State of New York (New York Laws of 1913, c. 816; as amended and re-enacted by New York Laws of 1914, c. 41 and Laws of 1922, c. 615), alleging that such application is repugnant to the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States and of the provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65; as amended by the Act of Aug. 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. §§ 51, *et seq.* [Specification of Errors: R. 8, 9]). Section 113, which has been applied to this case, reads as follows:

> "§ 113. INTERSTATE COMMERCE. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

Statement

This appeal is from an order and judgment of the Court of Appeals of the State of New York, which affirmed an order of the Appellate Division of the Supreme Court in and for the Third Judicial Department (R. 97, 98).

The Appellate Division unanimously affirmed a decision, made by the New York State Workmen's Compensation Board pursuant to the provisions of the Workmen's Compensation Law of that State, which denied the appellant's application for a review or rehearing of a referee's decision allowing disability compensation to the widow of Thomas J. Ahern, the deceased employee, for a period of disability preceding and extending to the date of Ahern's death. The referee continued the case for the preparation of a death claim by the widow of the deceased (R. 7, 8, 9, 21, 22, 88-91).

Prior to Ahern's death on January 3, 1949, and following the filing of a claim by him, the appellant paid workmen's compensation to him for 4½ years, from the date of his accident on July 1, 1944 until December 20, 1948, which was 2 weeks before he died, representing a sum of $5,528.66 (R. 100). This compensation was paid regularly in bi-weekly payments as a result of 3 separate decisions and awards made by the Workmen's Compensation Board early in this 4½ year period (R. 13, 19, 20, 21).

About the date of his death, a further bi-weekly payment was due and payable to Ahern, but evidently because of his death it was not paid. The record suggests that a "check" had been forwarded by the appellant but that the deceased had not received it before he expired.

> "Widow: That's right; check came and he didn't get it" (R. 90).

On January 18, 1949, at the first hearing before a referee following the death of Ahern and when a death claim was indicated, the appellant for the first time about 4½ years after the accident, challenged the jurisdiction of the Board and offered proof on the subject (R. 88-91).

The referee overruled the application and granted an award to December 20, 1948, covering the period of disability which already had been paid by the appellant and which had not been the subject of a formal award. He also awarded disability compensation for 2 weeks amounting to $56 for the bi-weekly period from December 20, 1948 to the date of death on January 3, 1949, which had been due at the time of death but had not been paid (R. 21, 22, 90).

As the appellant, at no time, has requested, sought or demanded and does not seek the recovery of the $5,528.66 which it has paid (R. 101), the only monetary amount involved on appeal in this case is $56 awarded as disability compensation for the period of 2 weeks prior to Ahern's death.

The deceased was employed as a switchman at Lackawanna, New York, by the appellant (R. 29, 31). On July 1, 1944, while he was engaged in the regular course of his employment, throwing a switch, and by reason of the exercise of unusual strain and effort, he suffered accidental injuries in the nature of an acute coronary occlusion, with resultant disability (R. 4, 99).

The deceased filed a claim for workmen's compensation benefits on January 15, 1945, with the Workmen's Compensation Board of New York State (R. 28-30). On February 1, 1945, the appellant filed with the Board an employer's first report of injury and a notice of controversy (R. 30-33). It controverted the claim solely on the issues of accident and causal relation (R. 33). Extensive testimony and proof on these issues were adduced before the referee at several hearings which were held between March 6, 1945 and July 3, 1945 (R. 35-83).

On September 24, 1945, the referee rendered a decision wherein he found in favor of the deceased on the issues of accident and causal relation and accordingly, allowed an award of compensation in the sum of $1,353.33 for disability covering the period of 48-2/6 weeks from July 1, 1944 to June 5, 1945 (R. 12, 13).

On October 11, 1945, the appellant filed an application for review by the Workmen's Compensation Board of the referee's decision of September 24, 1945 (R. 24). On November 15, 1945, the Board affirmed the referee's decision and denied the application for review (R. 16-18).

No appeal to the appellate courts of the State was taken by the appellant from the award or the decisions of the referee and of the Board.

A second award was made in favor of the deceased on January 10, 1946 in the sum of $868, for a disability period of 31 weeks between June 5, 1945 and January 8, 1946 (R. 19, 20).

A third award was rendered in favor of the deceased on February 5, 1947 in the sum of $1,568 for a disability period of 56 weeks between January 8, 1946 and February 4, 1947. Payments were directed to be continued by the appellant until a C-8 (form of notice to the Board of cessation of payments) was filed (R. 20, 21).

In accordance with the order of the Board, the appellant not only paid the aforementioned 3 awards, but it continued to pay compensation to December 20, 1948 (R. 90). It served no notices of appeal to the appellate courts of the State from any of the aforementioned awards or decisions.

On January 3, 1949, Ahern died as a result of his heart condition (R. 89, 90). Approximately 2 weeks thereafter and on January 18, 1949, a hearing was held before the referee at which the widow of the deceased was requested

to file a death claim (R. 90, 91). The question arose as to the widow's right to an award for disability compensation for the unpaid 2-week period up to the time of the death (R. 90).

At this hearing the appellant for the first time notified the referee that it objected to the disability claim on the ground of jurisdiction and offered proof on the question. The appellant attempted to raise the same objection to any claim for death benefits (R. 88, 89), but the referee stated that there was no death claim before him. The referee proceeded to make the award now on appeal for disability compensation (R. 21, 22, 90). It was not until the appellant applied for review by the Board of the referee's decision and for leave to introduce additional proof on the jurisdictional question, that the issue of interstate commerce was asserted (R. 26, 27).

At the hearing of January 18, 1949 (R. 88-91), in its application to the Workmen's Compensation Board for review (R. 26, 27), in its brief in the Appellate Division and in the Court of Appeals, the appellant sought, and in its brief in this Court (Conclusion: applt's. br., p. 26) the appellant seeks, the right to submit "proof" before the Workmen's Compensation Board as to the jurisdiction of the Board over the subject matter. This procedural request to submit proof was made for the first time after voluntarily submitting to the jurisdiction of the Board for 4½ years and after paying compensation for the same period.

The issues on appeal primarily concern those provisions of Section 113 of the New York State Workmen's Compensation Law which were added to that Section in the year 1922 (New York Laws of 1922, c. 615), reading as follows:

> "* * * provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other fed-

eral laws in case the claimant, the employ[illegible] and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

Summary of Argument

I

The waiver by the appellant and by the deceased of their rights and remedies under the Federal Employers' Liability Act and the acceptance by them of the terms of the New York State Workmen's Compensation Law and their submission to the jurisdiction of the New York State Workmen's C[illegible]pensation Board constituted a fair and valid compromise agreement and release whereby the parties settled their dispute in substitution for the litigation permitted by the Federal Act.

The application of Section 113 of the New York State Workmen's Compensation Law in this case does not conflict with the Federal Employers' Liability Act and violates no provision of the Constitution of the United States.

II

The conduct and acts of the parties established a valid compromise agreement and release which fairly settled the dispute under the Federal Act and which permitted and justified the invoking and the application of the waiver provisions of Section 113 of the New York State Workmen's Compensation Law.

ARGUMENT

I

The waiver by the appellant and by the deceased of their rights and remedies under the Federal Employers' Liability Act and the acceptance by them of the terms of the New York State Workmen's Compensation Law and their submission to the jurisdiction of the New York State Workmen's Compensation Board constituted a fair and valid compromise agreement and release whereby the parties settled their dispute in substitution for the litigation permitted by the Federal Act.

The application of Section 113 of the New York State Workmen's Compensation Law in this case does not conflict with the Federal Employers' Liability Act and violates no provision of the Constitution of the United States.

The deceased employee, Thomas J. Ahern, suffered accidental injuries on July 1, 1944 in the regular course of his employment with the appellant. He was disabled thereafter until January 3, 1949, when he died apparently as a result of his injuries. He filed a claim under the provisions of the Workmen's Compensation Law of New York State, and the appellant filed the usual documents incidental to a proceeding under that Statute.

The appellant and Ahern voluntarily submitted to the jurisdiction of the New York State Workmen's Compensation Board. Both parties were represented by counsel. During the early proceedings on the claim before that Board, 7 hearings were held and 3 awards were made. The last award directed the continuance of the payment of disability compensation by the appellant.

No appeal to the appellate courts of the State of New York from the awards or decisions which had been rendered by the Board, was taken by either party.

The appellant paid compensation regularly to Ahern for 4½ years, amounting to the sum of $5,528.66.

It was not until about 2 weeks after Ahern's death, at the 8th hearing on the disability claim held on January 18, 1949, and long after the rights and remedies of the deceased and his dependents had been barred by the 3-year Statute of Limitations applicable to causes authorized by the provisions of the Federal Employers' Liability Act, that the appellant, for the first time, interposed the objection t' at the Workmen's Compensation Board was without jurisdiction and offered to introduce proof with respect thereto.

This application was denied and, as the appellant had paid compensation regularly until December 20, 1948, and apparently had forwarded a "check" for the bi-weekly disability period terminating about the date of the death of Ahern on January 3, 1949, the referee by means of a formal award confirmed the payments to December 20, 1948, and granted the 2-weeks' disability compensation to January 3, 1949, which is now challenged on appeal.

In the light of the facts revealed by the record, and particularly the facts and circumstances outlined above, the Court of Appeals of the State of New York held that the acts and conduct of the parties cogently disclosed their intention and agreement to compromise and to settle the dispute through the Workmen's Compensation Board of New York State in substitution for the litigation permitted by the Federal Employers' Liability Act and that Section 113 of the Workmen's Compensation Law of that State validly was applied.

Referring to the case of *Heagney* v. *Brooklyn Eastern District Terminal*, 190 F. (2d) 976 (1951), cert. den. 342 U. S. 920 (1952), which will be discussed hereafter in more detail and wherein the payment of compensation pursuant to the New York State Workmen's Compensa-

tion Law extended over a period of 2 years instead of a period of 4½ years as in the case at bar, the Court of Appeals succinctly outlined the applicable legal philosophy and principles.

> "* * * In the *Heagney* case (*supra*), it was said at page 978: 'If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer'.
>
> "That language is equally applicable here. When the acts of the decedent and the employer are viewed in the light of what reasonably intelligent persons would naturally have intended by them, we think the inference, fairly to be drawn, is that both the employer and employee intended that the board's determinations be taken 'in substitution of the litigation permitted by the Federal Acts'. That being true, we can conceive of no sound reason why the employer should be permitted to urge his Federal rights at this late date" (R. 114) (303 N. Y. 545, 563, 564).

At another point in the opinion, the Court of Appeals, adopting, in part, the words employed by Judge Cardozo, in an early opinion of the same Court, said:

> "Here, it is clear, that we must construe the addition to section 113, in the words of Judge Cardozo, 'In the setting of the context', and it is equally clear that there is present in the facts already detailed 'a concurrent evidence of intention having the force of an agreement to forego one set of remedies and abide by another', and that such intention has been announced by all who must participate in such an agreement." (R. 104, 105) (303 N. Y. 545, 554).

There appears to be no doubt under the Federal decisions that an employer and an employee subject to the provisions of the Federal Employers' Liability Act may dispose of the claim of the employee against his employer, without contravening the Act, by entering into a compromise of the dispute and by settling it without litigation.

Callen v. *Pennsylvania R. Co.*, 332 U. S. 625, 631 (1948);
Boyd v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 266 (1949);
Heagney v. *Brooklyn Eastern District Terminal*, 190 F. (2d) 976 (1951), cert. den. 342 U. S. 920 (1952).

This doctrine is admitted by the appellant (applt's. br., p. 10) and the discussion of it in the opinion of the Court of Appeals bears repetition:

"The Federal Employers' Liability Act (Act, § 5; U. S. Code, Tit. 45, § 55), makes void any 'contract, rule, regulation, or device whatsoever' to exempt a carrier from liability. Notwithstanding that provision, the right of the employee to dispose of a claim he may have against his employer by entering into a compromise of his dispute is a right of contract which Congress did not intend to impugn. The employee may adjust 'his own affairs in his own way after a cause of action has arisen in his favor, so long as such adjustment is fair and violates neither public policy nor some proper and enforceable statutory provision'. (*Anderson* v. *Oregon Short Line R. Co.*, 47 Utah 614, 620.) That section forbids only contracts before injury exempting the master from liability and has no application to a contract of settlement. (*Ballenger* v. *Southern Ry. Co.*, 106 S. C. 200, 203.) Thus, the Supreme Court of the United States has

held that that provision does not operate to prevent an otherwise valid release of a claim by an individual engaged in interstate commerce since 'a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility'. (*Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, 631.) In the more recent case of *Boyd* v. *Grand Trunk W. R. Co.* (338 U. S. 263, 266), an agreement which sought to limit the venue of an action that might thereafter be brought by an employee under the Federal Employers' Liability Act was held invalid as contravening the act, but the court reaffirmed the ruling in the *Callen* case characterizing the agreement therein as a 'full compromise enabling the parties to settle their dispute without litigation, which * * * did not contravene the Act'." (R. 102, 103) (303 N. Y. 545, 551, 552)

Judge Fuld, in his dissenting opinion in the Court of Appeals, likewise affirmed the principle (R. 118). His dissent largely concerned factual considerations and the application thereto of holdings or rulings in early decisions of that Court.

As the Court of Appeals further pointed out (R. 106), there is nothing contained in the Constitution of the United States which prohibits, nor has this Court held, that, after an accident, all interested parties may not dispose of their controversy as they themselves see fit, provided that the means whereby such dispute is settled or adjusted does not violate public policy. If all parties agree that they will be subject to the workmen's compensation statute of a state, rather than resort to litigation, and the state has permitted such procedure, no valid objection to such an arrangement is disclosed. If the parties agree on a sum of money to be paid in discharge of the claim for personal injuries, such agreement, if there has been no over-reach-

ing or fraud, does not violate any constitutional provision, Federal legislation or announced public policy.

Neither is there any sound reason why the parties may not designate an impartial third person or group of persons to determine the amount to be paid in extinguishment of the claim. The Court of Appeals went on to say that to the Court's mind that is all that Section 113 of the Workmen's Compensation Law purported to accomplish. It was the Court's conclusion that Section 113 did not conflict with the fundamental law of the land or any Federal law or court holding.

As to the validity of the application of Section 113 of the Workmen's Compensation Law to the case at bar, the Court of Appeals also observed:

> "No constitutional provision, Federal statute or Federal court holding has been called to our attention, which prohibits a State Legislature from giving effect to the lawful words and/or acts of the parties. The Legislature of the State of New York has said, through section 113 of the Workmen's Compensation Law, that when the words and/or acts of the parties clearly establish that the parties desire to have the State Compensation Board award compensation rather than be compelled to litigate the differences, the board may award compensation. We do not think that any fault may be found with such a statute" (R. 108) (303 N. Y. 545, 558).

The appellant has not shown that the Federal Employers' Liability Act was intended to invade the field occupied by the application of the waiver provisions of Section 113 in this case. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country

(*Sherlock* v. *Alling*, 93 U. S. 99, 103 [1876]). The mere fact of employment does not bring the employees of a railroad within the Federal Employers' Liability Act (*New York, New Haven & Hartford Railroad Company* v. *Bezue*, 284 U. S. 415, 419 [1932]).

There is no room for contradiction that the enactment of the waiver provisions of Section 113 in the light of the purposes which they were intended to fulfill, was a reasonable exercise of the police power of the State.

It is difficult to perceive how the application of Section 113, under the permissive, voluntary and elective terms thereof, will interfere with or encroach upon the uniform operation of the Federal Employers' Liability Act, and it is submitted that the appellant's concern in this connection is wholly unwarranted.

As the instant case illustrates, the right to appeal to the appellate courts of the State and to this Court are preserved in the event of the invasion of any field exclusively reserved by Federal laws or by the Constitution of the United States, or if, as the appellant contends, the agencies of the State endeavored to circumvent such laws or Constitution. There are few statutes which are not capable of abuse in application. This Court will not assume in advance that they will be misapplied (*Allen-Bradley Local* v. *Board*, 315 U. S. 740, 746 [1942]; *United States* v. *Petrillo*, 332 U. S. 1, 11-12 [1947]; *Niemotko* v. *Maryland*, 340 U. S. 268, 289 [1951]; *Fox* v. *Washington*, 236 U. S. 273, 277 [1915]).

Aside from repeated bland assertions by the appellant that the uniformity of the application of the Federal Employers' Liability Act will be impaired, any substantial demonstration thereof is wanting. The dearth of cases which have been the subject of appeal in New York State on the subject matter of waiver under Section 113 of the Workmen's Compensation Law, a fact deserving mention

by the Court of Appeals in its opinions (R. 104, 117), strongly poses a refutation and negation of the appellant's contention that the application of the State statute would interfere with the uniform enforcement of the Federal Act.

Thus, the suggestions in the appellant's argument plainly are unjustified that the application of Section 113 compels or requires the submission of the appellant to State jurisdiction in respect of a subject matter exclusively within the jurisdiction of the Federal Employers' Liability Act and that there was an absence of jurisdictional subject matter when the Workmen's Compensation Board applied the waiver provisions of Section 113.

The following excerpt from the opinion of the Court of Appeals again reflects the unsubstantial nature of these suggestions:

> "* * * To our mind, the language of the section and that of the legislative committee which recommended its enactment plainly indicates that is a *permissive* statute intended to empower the board to make awards of compensation if all of the parties elect to settle their dispute in that fashion, and forego their Federal rights and remedies. It is not to be imposed upon them in the absence of a joint waiver or agreement evidencing an intention to be bound by its terms. In thus construing that section, we have been guided by the familiar principle of our jurisprudence that the courts are reluctant, and it is only as a last resort, that they will strike down a solemn legislative enactment on the ground that it is unconstitutional * * *" (R. 105) (303 N. Y. 545, 555).

The legislative committee mentioned in the excerpt was the Joint Legislative Committee of the New York State Legislature which in a report (N. Y. Legis. Doc., 1922, No 55) recommended the enactment of the addition to Section 113 of the Workmen's Compensation Law providing for

waiver which is involved on this appeal. The significant language of that report reads:

> " 'The proposed amendment will permit those who choose to elect to accept the provisions of our law to so elect, and the one to pay [and] the other to accept compensation thereunder' " (R. 105; applt's. br., p. 28).

The decision of the United States Court of Appeals for the Second Circuit in the recent case of *Heagney* v. *Brooklyn Eastern District Terminal*, 190 F. (2d) 976 (1951), cert. den. 342 U. S. 920 (1952), *supra*, constitutes a complete answer to essentially all of the contentions of the appellant.

The United States Court of Appeals in that case considered Section 113 of the New York State Workmen's Compensation Law and concluded that the Section was valid and that the agreement of the parties to abide by the awards of the State Board, plus payment of a substantial number of such awards, constituted a release or compromise of the parties' rights under the Federal Act. The employer in that case had paid compensation under the New York Statute for about only two years. In the present case, such compensation was paid for 4½ years and for 1½ years after the expiration of the Statute of Limitations applicable to causes of action permitted by the Federal Act. The only alleged basis of distinction between the two cases which the appellant could discover and urge consisted of the assertion that there was an express agreement to pay and to accept compensation in the *Heagney* case whereas the agreement in the case at bar was held to be an implied agreement by the Court of Appeals (applt's. br., p. 24). Such distinction, it is submitted, is without legal substance.

The appellant's reliance on the case of *Erie Railroad Co.* v. *Winfield*, 244 U. S. 170 (1917) and on the New Jersey

Statute (applt's. br., pp. 16-19), which was construed by the Court, is ill founded and the decision, in fact, as the Court of Appeals' opinion establishes, lends support to the contentions of the appellee herein.

"* * * The court held that it was beyond the power of a State to interfere with the operation of the Federal Employers' Liability Act 'by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory *presumption*'. (Emphasis supplied.)

"It will be seen that the court did not declare that it is beyond the power of a State to enact a statute conferring upon the employer, employee and insurance carrier the privilege of compromising their dispute by submitting it to the board. Moreover, the language of the Supreme Court in the *Erie* case (*supra*) above quoted, indicates that the court would have reached a different result had the parties *actually agreed* to forego their Federal rights and remedies.

"Section 113 of the New York Workmen's Compensation Law, unlike the New Jersey statute, does not require the parties to choose between the Federal act and the State Workmen's Compensation Law, nor does it impute such an election to them by means of a presumption as did the New Jersey statute. Section 113 merely offers the parties a means whereby they may compromise their dispute, if they are *mutually desirous* of so doing" (R. 108) (303 N. Y. 545, 557).

The conduct and acts of the appellant in this case portray a comparable pattern to the ones which motivated the following comments of the Court in the respective cases cited below:

In *Booth Fisheries Company* v. *Industrial Commission of Wisconsin*, 271 U. S. 208, 211 (1926), the Court held:

> "* * * the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. * * *"

In *Davis* v. *Wakelee*, 156 U. S. 680, 691 (1895), the Court said:

> "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. * * *"

In *Burgess* v. *Nail*, 103 F. (2d) 37, 44 (1939), the Court stated:

> "One who accepts and retains the benefits of a void judgment is estopped to assert its invalidity. The principle applies to cases where the invalidity arises from want of jurisdiction of the person or over subject matter of the action."

II

The conduct and acts of the parties established a valid compromise agreement and release which fairly settled the dispute under the Federal Act and which permitted and justified the invoking and the application of the waiver provisions of Section 113 of the New York State Workmen's Compensation Law.

Having considered the facts and circumstances disclosed by the proof in the record, the Court of Appeals of New York State unequivocally held that the conduct and acts

of the parties for several years, subsequent to the Workmen's Compensation Board's ruling on the questions of accident and causal relation and its direction that compensation be paid, established as conclusively as the evidence in the *Heagney* case, *supra*, that it was the mutual desire of the parties that the Board, acting as an impartial third person, should determine the amount to be paid in discharge of the claim by the deceased (R. 112).

The Court discussed in detail the events and circumstantial features evincing the intention of the parties to enter into a compromise agreement whereby the dispute under the Federal Act might be settled without litigation. The Court stressed such factors to the effect that there could be no suggestion that the parties were not fully aware of their Federal rights and remedies, that they were represented before the Board by competent counsel and that the appellant and the deceased were chargeable with the knowledge that the Board was powerless to require the payment of compensation unless they had waived their Federal rights and remedies (R. 112-114).

The Court related many other significant indicia establishing the compromise agreement and waiver, including the appellant's failure to appeal the earlier awards (§ 23 of the Workmen's Compensation Law decrees awards and decisions to be final unless reversed or modified on appeal), the continuance of the payment of compensation after the Statute of Limitations dictated by the Federal Employers' Liability Act had run against the claim of the deceased and his dependents, that by reason of the running of the Statute of Limitations the deceased and his dependents lost their rights and remedies under the Federal Act, that the appellant had a duty to speak and by failing to do so the deceased was led to believe that the appellant was equally agreeable that the Board should act and that the appellant's silence would be construed as an acceptance of the deceased's offer to compromise, that there

was no contention or implication in the evidence of overreaching or fraud, that the waiver provisions of Section 113 were permissive and voluntary and imposed no restraint on the freedom of action of the parties, that the appellant paid compensation for 4½ years, choosing not to assert that the Board lacked jurisdiction (R. 112-115), and that the appellant had not sought the return of any money which had been paid (R. 101).

The following language of the Court aptly summarizes the inference to be drawn from the conduct and acts of the parties:

> "* * * When the acts of the decedent and the employer are viewed in the light of what reasonably intelligent persons would naturally have intended by them, we think the inference, fairly to be drawn, is that both the employer and employee intended that the board's determinations be taken 'in substitution of the litigation permitted by the Federal Acts'. * * *" (R. 114) (303 N. Y. 545, 564).

The Court of Appeals in its opinion set at rest the vexing questions relating to so-called "interlocutory" and "final" awards, which had arisen by virtue of early decisions of the State courts involving accidents and the status of the law existing before the enactment in the year 1922 of the waiver provisions added to Section 113 of the Workmen's Compensation Law. The Court explained that the addition to Section 113 was not a codification of the earlier Court expressions (R. 105).

The instant case was the first case since those decisions, which required an extensive construction of the provisions added to Section 113 (R. 104).

Dismissing the contention that a so-called "final award" was a necessary ingredient of a compromise and waiver, the Court of Appeals quoted the following significant

expressions in the *Heagney* case, *supra*, found at page 979 of the report of that case:

> "* * * What we must look for, therefore, is a fair compromise whereby the parties settle their dispute in substitution for the litigation permitted by the Federal Acts; there is no mystic significance to be accorded a 'satisfaction' upon some assumed 'final award'. When a state procedure accomplishes just that by agreement of all concerned, it should therefore be at least as valid as a formal release secured on payment of a few hundred dollars. And certainly no invidious distinction should be made so that only a purely temporary injury can be settled in this way, and that any permanent injury is excluded from settlement just because the state process requires continuing payments for the good of the injured employee" (R. 111) (303 N. Y. 545, 560).

It appears in order at this point to observe that the dissenting opinion in the *Heagney* case, *supra*, indicates that the viewpoint therein was influenced by the aforesaid early decisions of the courts of New York State. If the decision of the Court of Appeals in the instant case had been before the Federal Court at the time it considered the *Heagney* case, it reasonably can be assumed that the viewpoint of the dissenting Judge in that case, in a large measure, would have been in harmony with the majority of the Court (190 F. (2d) 976, 982, 983, 985).

The Court of Appeals interpreted the legislative intent implicit in the added provisions of Section 113 and construed that intent in its relation to the application of the waiver provisions therein with respect to both express waiver and implied waiver by conduct. The Court said in the latter connection:

> "* * * In the case now before us the employer which made its agreement by conduct rather than

declared intention, must be held to be equally bound since in the law there is no distinction between agreements made by words and those made by conduct. * * *" (R. 111) (303 N. Y. 545, 560).

* * *

"* * * An agreement by conduct does not differ from an express agreement, except in the manner by which its existence is established" (R. 112) (303 N. Y. 545, 561).

* * *

"* * * It is elementary that there can be no agreement unless all of the parties involved intended to enter into one. Moreover, it is well-established contract law that in determining whether the parties possessed the necessary intention to contract, an objective test is generally to be applied. That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling. * * *" (R. 111) (303 N. Y. 545, 560, 561).

Consequently, it properly can be said that the construction by the Court of Appeals of a statute of its own State generally will be recognized as binding in this Court (*Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 432 [1951]; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78 [1938]). However, it cannot be denied that the construction accorded the State statute by the Court of Appeals allowing its application in this case bears a rational relation to the facts and incontrovertibly is consistent with the Federal law and decisions. The *Heagney* case, *supra*, only need be mentioned as illustrative.

Workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results (*Baltimore & Philadelphia Steamboat Company* v. *Norton*, 284 U. S. 408, 414 [1932]).

It has been held that where a cause of action arises under an agreement or statute, the parties involved may by their actions, words or conduct enter into a compromise agreement to render and/or accept a substituted performance by the obligor in satisfaction of the original claim and that such a compromise agreement discharges the original cause of action (*Heagney* v. *Brooklyn Eastern District Terminal, supra; McCarney* v. *Scott*, 146 F. (2d) 624, 626 [1945]; *In re Plaza Music Co., Inc.*, 10 Fed. Supp. 310, 311 [1934], aff'd, 77 F. (2d) 1010 [1935]; *Ohlendiek* v. *Schuler*, 299 Fed. 182, 188 [1924], cert. den. 266 U. S. 608 [1924]; *Wyatt* v. *New York, O. & W. R. Co.*, 45 F. (2d) 705, 708 [1930], cert. den. 283 U. S. 829 [1930]; *In re Kellett Aircraft Corporation*, 173 F. (2d) 689, 692 [1949]; *Maryland Casualty Co.* v. *Cushing*, 171 F. (2d) 257, 258 [1948]; *Albert A. Moers* v. *Carrie C. Moers*, 229 N. Y. 294, 300, 301 [1920]).

The facts in the case at bar disclose a compromise agreement wherein mutual promises were clearly implied to render a substituted performance in satisfaction of the existing obligations, together with mutual promises to discharge the obligations in consideration thereof. The compromise agreement intended to and did discharge the original cause of action and a novation resulted. It seems entirely logical that the agreement of the appellant and the deceased to be bound by the terms of the Workmen's Compensation Law was an agreement in complete and full satisfaction of any existing rights and remedies under the Federal Act, substituting a definite statutory liability within fixed limits prescribed by the terms of the Workmen's Compensation Law.

Conclusion

The evidence and proof established as a matter of fact and law a fair, valid and full compromise agreement of settlement and release, and of waiver, of the Federal

rights and remedies under the Federal Employers' Liability Act within the provisions of both the State and Federal statutes and of the United States Constitution.

No provision of the Federal Employers' Liability Act forbade the application of Section 113 of the New York State Workmen's Compensation Law to this case and such application invaded no field exclusively reserved by the Federal Act.

The conduct and acts of the parties constituted an implied waiver with the same force and effect as an express waiver.

The Workmen's Compensation Board of New York State was vested with jurisdiction of the parties and of the subject matter, and the application of Section 113 of the Workmen's Compensation Law to this case violated no provision of the Federal Employers' Liability Act or of the Constitution of the United States and in no way interfered with the uniform operation of the Federal Act.

The order and judgment of the Court of Appeals should be affirmed.

Dated: New York, N. Y., December 3, 1952.

Respectfully submitted,

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